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SEYMOUR D. THOMPSON, JOHN D. LAWSON, Editors. | ST. LOUIS, FRIDAY, OCTOBER 6, 1876. | Hon. JOHN F. DILLON, Contributing Editor.

WE take pleasure in announcing the name of John D. Lawson, Esq., of the Saint Louis Bar, as associate editor of this JOURNAL. Mr. Lawson has been connected with the editorial department of this paper for the last six months, during which time he has performed the greater share of the work of preparing cases for the press and making abstracts of decisions, besides writing many of the editorials. The increase of other business in the hands of the managing editor, will oblige him, hereafter, to commit most of the editorial care of the JOURNAL to his associate.

Current Topics.

COVENANT TO RENEW IN LEASE—ARBITRATION. In the United States Circuit Court on the 22d ult., in the case of *Biddle v. Tscheider*, the action was brought for use and occupation. The answer set up that the parties entered into a lease for ten years with a privilege of renewal. One or more periods of ten years had expired. The mode of renewal was to be as follows: each party was to select a disinterested person, and if these two were unable to agree upon the terms of renewal, they were to select a third party as umpire. Five unsuccessful attempts were made to agree. The lease specified that whatever might be the sum agreed upon, it should not be less than six per cent. of the value of the improvements. The lessee alleged that he selected fair and reasonable men, who were uninstructed by him, but that on the contrary the leesor selected unfair and unreasonable men, and instructed them beforehand, and hence the failure to come to an agreement. The case came before the court on a motion to strike out the defendant's answer. Judge Dillon said that the defendant was in possession of plaintiff's premises. The only term granted was for ten years, which had expired; the tenant was therefore liable for use and occupation. Whether the court would exclude the value of improvements by the lessee, in case of a new agreement, it was not necessary to consider. The tenant was clearly bound to pay rent. The question was whether there was any bar by reason of the unfair conduct of the plaintiff. The ground was taken in the argument that a court of equity would never compel specific execution of an agreement to arbitrate, and a case in Vesey and two in the United States went very far in this direction. A covenant to renew will be enforced in equity; if there is an agreement to determine a reasonable rate, and if it can be done, a court of equity will compel it to be done. The lessee had made valuable improvements, and there should be some way to give the lessee the benefit of his contract, and not force him to bring a suit for damages. Against this view is the case in Vesey, but there was no fraud in that case. The learned judge considered that the remedy of the lessee was by means of counter claim under the statute, and have his damages assessed against the lessor, or to file a bill in equity to compel a renewal of the term. If there were no fraud in the case, he doubted the equitable jurisdiction of the court.

BANKRUPT—OBJECTION TO DISCHARGE.—In the same court last week, *In re Filley*, certain objections to the discharge of the bankrupt were considered. The first ground of objection was, that the bankrupt had fraudulently omitted a large debt from his schedule. The only evidence on this point was the testimony of the confidential clerk that the bankrupt had instructed him to put everything in, and that this was omitted without any fraud on the part of the bankrupt. Under these circumstances, Judge Dillon overruled the objections. The second objection was the alleged fraudulent payment of twenty-eight hundred dollars, on the 20th of July, 1872, to a certain bank. The bankrupt, in raising money, deposited collateral security with the bank, in this case, bonds, and this payment consisted in the bank's appropriating the dividends on the bonds, without the consent of Filley. The learned judge held that the bank had this right; that it was such a set-off as would be protected by the bankrupt act.

MISSOURI STATUTE RELATING TO DAMAGES FOR DEATH OF PARTY CONSTRUED.—On the 30th ult., in the case of *McCutcheon v. The Receivers etc.*, the same court was called upon to construe sec. 22, ch. 43, Wag. Stat. p. 519, relative to the right to recover damages for the death of a person through the wrongful act of another. This section allows a certain amount to be sued for and recovered. "First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, etc." It was sought to extend this right of action to orphan children, living with their grandmother, for her death through the alleged wrongful act of the defendant railway. Judge Dillon held that the statute must be construed strictly, and that no action was given under it to the grandchildren, in the case before him.

MANUFACTURING CORPORATION—SUIT AGAINST STOCKHOLDER—SET-OFF—BONA FIDES.—In the same court last week an interesting case, *Farrish v. Hazard*, was decided on the above points. This was a suit under the Missouri Statute, by one creditor against a stockholder of a manufacturing corporation. Sec. 13 of that act, Wag. Stat., p. 336, provides that "no stockholder shall be personally liable for the payment of any debt contracted by a company formed under this chapter, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall have become due; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any company, for any debt so contracted, unless the same shall be commenced within two years from the time he shall cease to be a stockholder in such company, nor until an execution shall have been returned unsatisfied, in whole or in part." The action was against the holder of unpaid stocks of the corporation, originally issued to another and transferred to defendant without consideration, and was brought to enforce payment. The petition alleged that the stock was unpaid, that defendant was the holder, and that suit was brought against the company within one year, and that in 1871 the company became insolvent. The general law of the state provides that if any company becomes insolvent, suit may be brought against any stockholder without joining the company. The answer of the defendant set up that although the plaintiff had brought suit he had voluntarily dismissed it. Replication that it was dismissed at request of the defendant, and for his advantage. To this there was a demurrer filed. Judge Dillon considered that the dismissal should have been shown to be in some way connected with the parties, and that defendant knew why it was brought, and asked that it should be dismissed. He would then be estopped. The demurrer was therefore sustained.

The court struck out that part of the answer which at-

tempted to set off a debt from the corporation to the stockholder against the plaintiff.

The question of consideration was then considered by the court. The members of the corporation, it appeared, had conveyed their property to the corporation, and taken stock in payment. Defendant in his answer alleged that he searched in the books of the company, and on the faith of the records, which showed the stock to have been conveyed for value, he purchased it from one of the parties *bona fide*, and for a valuable consideration. On a motion on the part of the plaintiff to strike out this answer. Judge Dillon said, that if the books of the company showed that this stock was paid for, and the defendant bought it as full-paid stock, a creditor of the corporation could not compel him to pay for it twice, and denied the motion.

INTER-STATE EXTRADITION—LIBEL.—Recently an application was made to the governor of the state of Illinois for a requisition, for the purpose of taking the editor of the Chicago *Times* into the state of Wisconsin, for trial on an alleged libel published in that paper. The governor of Illinois referred the matter to the attorney-general of the state, whose opinion has just been given, to the effect that the editor, Mr. Storey, should not be given up to the authorities of Wisconsin. From the papers before him it did not appear either that Mr. Storey was within the state of Wisconsin at the time of the offence, or that he had fled from that state to take refuge in Illinois. "The law," says the attorney-general, "is that where a newspaper containing a libelous article is printed and published in one state, and the publisher causes such paper to be circulated in another state, he is guilty of the publication of the libel in the latter state, although personally not within its limits at the time of such publication. Commonwealth v. Blanding, 3 Peck, 304; Bishop's Criminal Law, Sec. 110. But such state is not entitled to demand his arrest and surrender under sec. 2 of art. 4 of the federal constitution, unless the party charged with the offence was actually within its limits, and, while there, committed the crime and fled therefrom.' Hurd on Habeas Corpus, 606; *Ex parte* Joseph Smith, 3 McLean, 132. In the matter of Heyward, 1 Sanford, 718; Cooley's Constitutional Limitations, p. 16, note 1; Sedgwick Statute and Constitutional Law, p. 605. So far as appears from the papers before me, Mr. Storey may have been in the state of Illinois at the time of the alleged publication of the libel, and every act performed by him in connection therewith may have been done in this state. For every such act he is answerable to the laws of Illinois. Each state has power, and it is its duty, to make suitable provision for the punishment of every criminal act committed by persons while within its territorial limits. Accordingly, our statute provides not only for the punishment of the crime of libel, but also for the punishment of those who, while within the state, aid or abet, incite or procure, the commission of crime in other states. For this reason it is not essential to the administration of justice that a person be delivered up to another state for prosecution, if he was, in fact, in this state at the time of the commission of the alleged offence. Influenced by these considerations, the courts have held that the proper construction of the clause of the federal constitution relative to the arrest and surrender of fugitives from justice is, that 'the fugitive must have been in the state where the crime was committed, and fled therefrom.' 1 Kent's Com., p. 642, note 1; *Ex parte* Smith, 3 McLean, 134. While the courts of Wisconsin may have jurisdiction of the offence alleged to have been committed in that state, if they can rightfully acquire jurisdiction of the person of the offender, nevertheless, the documents submitted to me do not, in my opinion, present such a case as would make it the duty of the executive of this state to cause the arrest and surrender of Mr. Storey to the authorities of Wisconsin."

Railway Mortgages—What Claims are Prior Liens.

The great number of railway mortgages which are now being foreclosed in the various courts throughout the county—state and federal– has given general interest to the question what debts of a railway company are entitled to the status of liens or preferred claims. An impression seems to have got afloat that Judge Dillon, has in some case or cases which have arisen in the eighth federal circuit, acted upon the principle that debts contracted by railway companies in such cases within six months of the commencement of foreclosure proceedings, should be paid, in case such debts were contracted for supplies, the services of regular employees, or for carrying done by connecting railway lines. We understand, however, that this is a mistaken impression, and that no such principle has been adopted. Indeed, it is difficult to see how it could be adopted in view of the principles laid down in the case of the Galveston Railroad v. Cowdy, 11 Wallace, 459. In that case, the Supreme Court of the United States, in the absence of a statutory lien law applicable to the contract in question, denied prior payment to a contractor who had furnished iron which actually went into the road, and distinctly enunciated the principle that the rule *qui prior est in tempore, potior est in jure* is applicable to such cases. It is true that in the case of Ketchum v. The Pacific Railroad and Littlefield v. The Atlantic and Pacific Railroad now pending in the United States Circuit Court for the Eastern District of Missouri, and also, as we are informed, in other suits to foreclose railway mortgages which have arisen in the eighth federal circuit, claims for supplies and for wages have been allowed priority of payment; but this has only been done by consent of all the parties in interest. It is easy to see that the establishment of a rule giving priority to such claims, as a matter of law, would seriously impair the security of railway mortgages. This novel species of lien has been called by some an "equitable lien," and by others it has been facetiously denominated an "admiralty lien on wheels." Such a lien or priority was declared to exist by a *nisi prius* judge at Richmond, Virginia, in the case of Duncan *et al.* v. Trustees etc. Chesapeake & Ohio Railroad *ante* p. 579; and also by the Court of Appeals of Kentucky in the case of Douglas *et al.* v. Cline, which will be published in this journal next week. In the latter case Cofer, J., dissented in an opinion of great length. These cases both related to the wages due the regular employees of the defendant railway company. In the former case, these wages accrued entirely after default of the railway company in paying the interest due on its bonded indebtedness; and, in the latter case, most of the wages accrued after a similar default had been made. There was, therefore, much reason in holding that when the employees of a railway company continued in their employment, after the insolvency of the company had become notorious, and thereby preserved the mortgaged property and kept it in operation for the benefit of the public, a court of equity would not allow their demands to be obliterated by the foreclosure proceedings. The Virginia court placed its decision upon the ground that the employees in continuing in service after such default, and after the beneficiaries under the mortgage had acquired the right to enter and take possession of the property and operate it for themselves, became, in effect, tenants at will of the bondholders. The Kentucky court declared that the case was one within the operation of the rule that he who seeks equity must do equity. The mortgagees had the power under the mortgage to enter upon the property after default by their trustees, and use, operate, or sell it for the purpose of satisfy-

ing their demands. But instead of doing this, they had asked a court of equity to exercise the extraordinary power of taking the mortgaged property, *pendente lite*, out of the hands of its owners, and operating it for their benefit. In doing this they submitted to the power of the court to do equity by ordering payment to be made out of net earnings which had accrued in the hands of the receivers, to the officers and employees of the defaulting corporation.

In the case of Ketchum v. The Pacific Railroad above referred to, an attempt was recently made to make an interesting application of this new kind of equitable lien. The Atlantic and Pacific Railroad Company, lessees of the Pacific Railroad of Missouri, had, before the institution of proceedings to foreclose mortgages on both roads, become indebted to the Atchison and Nebraska Railroad Company on account of services rendered by that company, in carrying freight and passengers on "through" bills of lading and "through" tickets. This company intervened in the suit named, and asked payment in preference to the bondholders, on the ground that the claim was similar in its nature to the claims of employees for their wages, and also on the ground that the proportion of freight and passage money earned by the petitioning railway company under the contracts in question had been collected in advance by the Atlantic and Pacific Railroad Company, and was in the nature of a trust fund held by the latter company for the benefit of the former, which fund, on the appointment of the receivers, passed into their hands charged with the trust. The case was argued before a master by Hon. Willard P. Hall on behalf of the petitioner, and by George W. Cline, Esq., on behalf of the bondholders. The master reported adversely to the claim, on the ground that it was a mere debt at large of the Atlantic and Pacific Railroad Company, and this report was, after argument before Treat, J., confirmed.

A similar question was raised and argued before the master in the case of Littlefield v. The Atlantic and Pacific Railroad Company, in what is known as a "pooling" contract entered into between the Missouri River, Fort Scott and Gulf Railroad Company, the petitioning claimant, and the defendant railroad. The master reported adversely to the claimant on the ground taken in his report in the previous case, and the counsel for the petitioner, having ascertained that the views of Judge Dillon were in accord with the views of Judge Treat upon this subject, did not except to the report.

Slander from the Pulpit.

Two cases recently decided by the court of Queens Bench, of Lower Canada, both actions of slander brought against Roman Catholic priests, have occupied public attention for some time, in that province, the decision of the court in one of them—where the principal defence was that a priest could not be sued for any language used by him while in the pulpit—being awaited by the liberal party of Quebec, with something of the expectation and interest which, but a little before, The Guibord case aroused. The first case, *Brossoit v. Turcotte*, 20 L. C. J. 141, was soon disposed of, the facts and decision of the court being as follows. Plaintiff was an advocate, residing at Beauharnois where he practised his profession. Defendant was the *curé* of the adjoining parish. One day the defendant went into the shop of a merchant in the town where plaintiff lived, and enquired of him whether he had caused a letter to be written to him by the plaintiff. On his answering in the affirmative, the defendant said: "You are very wrong in employing Brossoit as your advocate; Don't you know that if you continue to employ him all the priests will leave your shop, and in a little while, all honest people will do the same? Don't you know he has sued his *curé*, and that he is not an honest man? Don't you know that he has been excommunicated, and that in employing him you expose yourself to excommunication? Don't you know that he is a member of the Canadian Institute? I tell you that if you continue to employ Brossoit, you will not succeed in your affairs." There were several persons present, in the shop, when this conversation took place, and the proof, on the trial, left no doubt that the language was used as charged in the plaintiff's declaration. From the report of the case, which is in the French language, it does not appear that a jury was called. The judge found in favor of the plaintiff with $8 damages. On appeal to the court above the damages were assessed at $50, the appellate court holding that the defamatory words were clearly actionable, and that a smaller verdict would actually punish the plaintiff for defending his reputation.

The second case, *Richer v. Renaud* 20 L. C. J. 143, was not so readily determined, a final decision being rendered only after three courts had passed upon it. Richer, the plaintiff, was a blacksmith; he was also it would seem something of a learned blacksmith, as he had been at college, but he could hardly be called a studious blacksmith if the defendant is to be believed, as he claimed that he was expressly referred to when the priest in the sermon in which the slanderous words were alleged to have been used said that it "was not people who had been at college in the same class for eight years who were able to argue." But that he was an inquisitive and rather herteical blacksmith is certain, and, if not able to argue, was, from all accounts, very much predisposed to do so, and particularly on religious subjects. Not only did children, as in the case of the Village Blacksmith of the poet, on their way from school, look in at him as he welded the iron, and watch the sparks fly "like chaff from a threshing floor" but the people of the parish had a way of assembling in his shop, and discussing subjects which the priest came to the conclusion if not stopped would make the forge a fomidable rival of the church. Polemics and horseshoes were hardly things to go hand in hand, and he therefore determined to leave him without an audience for the first or a customer for the last, by interdicting the people of the parish from patronizing his shop for either. So at the next public service, he told the people that there was a certain shop in the village where controversy was preached, that it surprised him that any respectable man would go into such a place, and that in future if anyone visited that place, the sacrament would be refused them. This was effectual, and Richer speedily found himself *sans* hearers, *sans* customers. He accordingly entered an action against the *curé* for damages. The first trial resulted in favor of the defendant, the judge dismissing the action on the ground that the defendant had not attacked the plaintiff's private character, but had only advised his flock not to frequent plaintiff's shop. The case was thereupon taken up to the Court of Revision, and on the 31st March, 1875, the judgment of that court, reversing the judgment of the court below, and entering a verdict of $100 in favor of the plaintiff, was rendered. Berthelot, J., dissented, for the reason that the court below, being in a better position to appreciate the evidence than the judges of the higher court, he was reluctant to disturb a judgment based upon evidence. Torrance. J., in delivering the judgment of the court, Mondelet, J., concurring, said:

The *curé* said there was a certain shop in which it was said there was no purgatory, and he warned his parishioners not any longer to support the proprietor of this shop, under penalty of being deprived of the sacraments. All the world knew that the plaintiff was intended. These are samples of the testimonies. I don't see in the evidence any proof of the charges of the *curé* against the plaintiff. Was the *curé* right in his denunciations? Was there a wrong done to the plaintiff, and an *injure* for which the law holds the defendant responsible? I have said that the *curé* has not proved his charges against the plaintiff. The plaintiff was his parishoner, one of his flock, entitled to his protec-

tion and support. It is difficult to exaggerate the influence of a zealous and earnest minister of religion in the parish where he labors, and not difficult to realize the potency of the threats that the man employing the plaintiff in the exercise of his lawful calling should be deprived of the benefits of the sacraments—the sacraments of baptism and marriage, the holy communion and the sacrament of extreme unction so dear to every devout catholic that would go to meet his God without fear. What parishoner would be so bold as to hold for naught the threatened deprivation of the sacraments? It was excommunication *pro tempore*. How likely that in a parish consisting chiefly or wholly of the parishioners of the defendant, the plaintiff might find himself, by the influence of his clergyman, deprived of the means of a livelihood, and obliged to abandon his domicile. It was interdiction from fire and water—*interdictio ignis et aquæ*. When a minister of religion, who is supposed not to confer with flesh and blood, uses the spiritual weapons at his command—the weightiest artillery in the world—against an individual, it is at least required that the rules of the church, as well as the maxims of the law, should sanction his action. It is not sufficient to say, *Sic volo, sic jubeo; stet pro ratione voluntas*.—My will is law. There is no difficulty in arriving at the conclusion that the defendant has, without apparent justification, inflicted upon the plaintiff a wrong for which the law of the land, to which all must bow, and before which all are on a level, holds the wrongdoer as responsible. Then comes the question of the assessment of the damages. We are all agreed that there is no proof of special damages. Yet there may be damages payable. In the case of Rolland v. Jodoin, 2 L. C. L. J. 20, the plaintiff complained of the defendant that the latter met him in the street and calling him by name, to which plaintiff made no answer, exclaimed, "*Paie tes dettes, paie tes dettes.*" The superior court considered the matter so trifling that the action was dismissed. In the court of appeals the judgment was reversed, and, though the matter was regarded of small importance, $80 and costs were awarded."

The defendant now had his appeal, and the case was taken to the Court of Queen's Bench. On the 22d of March last this court finally disposed of it, by reversing the judgment of the Court of Revision, and dismissing the suit. Dorion, C. J., Ramsay and Tessier, J.J., concurred in this finding, Sanborn, J., dissenting. The chief justice cousidered that no action lay, but wished it "to be distinctly understood that it is because I find that the words used are not slanderous, and that there is no malice and no damage proved, and not because the respondent might have used with impunity in the pulpit language for which he would be liable in damages, if he had used it elsewhere." The opinion of Ramsey, J., on the same side is more entertaining than profound. The defendant's words, he considered, amounted to these: "This blacksmith turns his shop into a place for discoursing against the religion which you profess, which he pretends to be his, and which I, under the sanction of the law, am placed here to teach; he is setting a bad example and he should not be encouraged. If respectable people were to cease to encourage him by giving him work, he would be obliged to leave the parish." Scoffing against religion was not a thing to be tolerated or countenanced by a clergyman. He saw a parallel between the case at bar, and the case of a rector of an English parish threatened with the invasion of celebrated revivalists, and his warning his parishioners of the impropriety of attending "heterodox and sensational" religious services, and asked if "the two preachers of whom we have heard so much" would, in such an event, have an action against the rector. If the plaintiff had any right of action, he thought the defendant would be entitled to the same as, "if the denunciation of scoffing and the employment of scoffers by the priest was actionable, the jokes of this philosophical blacksmith against the utility of masses and prayers were equally so." He also saw another serious obstacle in the way, in that, while the allegation was that under penalty of deprivation of the sacrament, the defendant forbade his parishioners, from the pulpit, to give the plaintiff work, the proof was that the *curé* "forbid his parishioners to *frequent* the shop, not to give work to the person in question, who spoke against religion and the priests." This, in his opinion, was a "very different thing, and of itself fatal to the plaintiff's case." Dissenting from the view of the law taken by the majority of the court, Sanborn, J., delivered a lengthy opinion. On the question as to liability of the defendant for the words spoken by him, he said:

"The witness says it (the alleged scandal) made a marked impression upon the audience. To accuse a person of being contentious and of provoking religious controversy, and disparaging the teaching of his priest, or the teachings of any religious instructors, is not of itself defamatory. The gravamen of the charge is that appellant endeavored by his observations to destroy respondent's business, by intimidating his parishioners under penalty of deprivation of church privileges, from employing respondent in his lawful business. The place and time, when and where the utterances are made, may render language defamatory which otherwise would not be so. This was said on Sunday, in presence of the congregation, when the priest is expected to be careful and deliberate in his utterances, and where his counsel and admonitions are entitled to the greatest weight. Doubtless a priest or minister has the greatest latitude in denouncing vice, or what he considers heresy, in fact, evil habits of life and conversation and bad companionship. He is permitted to warn and enjoin upon his hearers, and particularly the members of his charge, against all things, which he believes contrary to good morals and religious life, but this must be of a general character. His sacred calling does not permit him, any more than it does any other man, to single out an individual and denounce him as unworthy of confidence, and enjoin upon his hearers, under severe penalties, not to visit or frequent his place of business. No person, whatever be his position, has a right thus arbitrarily to deal with individuals, and interfere with the free exercise of their calling. If any man violates the law he may be prosecuted civilly or criminally before the courts. If he exposes himself to church discipline, he can be visited with such spiritual penalties as his relations to a church necessarily involve, according to the rules and modes of trial which are adopted in the church to which he belongs; but no one has the right to take the matter into his own hands without trial, or perhaps jurisdiction to try, and to disparage a man by words or deeds in the free exercise of the business whereby he lives. Every man is entitled to immunity from injuries of this kind. If a man makes himself by his habits or conversation, displeasing to his neighbors or to society, unless he commits acts which expose him to punishment of the law, or the censure of his church by proper mode of trial, he must be left to be appreciated by the common sentiment of men. No person can interfere with him, except by some competent legal mode of complaint for a wrong done, for which he may be subjected to trial. This principle was recognized in Derouin v. Archambault, 19 L. C. J. 157. Cases are cited in Dareau where a *curé* used the occasion of his sermon to hold up the seignior of his parish to obloquy, where he was deprived of his functions for five years, and mulct in fine, and compelled to retract and apologise. This was because it was a seignior, and of the spirit of insubordination it would excite among the people towards the seignior. A case of a private person is reported whom, without apparent cause, other than that he had taken a seat which the *curé* ordered him not to take, he ordered to leave the church, and when the parishoners declined to put him out, he refused to say mass. In this case the priest was condemned to pay 50 livres damages and costs. This was in an age when distinctions in social station were more regarded than now, consequently there was greater disparity in the sentence for calumniating a seignior and an ordinary parishioner, than would accord with the genius of our age and society, but the principle of the law is the same. If this were subject to English law, there would be more difficulty in sustaining respondent's claim without proof of special damages, as by the act of the *curé* he is charged with no crime or any offence which would subject him to loss of office or status; but our law goes further and makes the use of language under circumstances where not warranted such as to bring a person into contempt, or calculated to deprive him of the free exercise of his calling, an injury for which damages are presumed. The facts proved respecting the appellant, however, would constitute slander under the English law."

On the question of damages he thought the law to be as follows:

"Slander here is governed by civil law as respects private damages. This was determined in Belanger v. Papineau, 6 L. C. R. 415; Bedarride "Responsabilité," No. 34. It has been adopted in our jurisprudence. The courts have awarded damages estimated at discretion, without proof of special damages, according to the circumstances of the case, where an action lies under our law, although under the English law no action would lie without proof of special damages. Rochon v. Gaspel, 1 L. C. L. J. 65; Leroux v. Brunel, 1 L. C. L. J. 111; Lighthall v. Walker, 2 L. C. L. J. 43. It was held by this court in the case Leger v. Leger, 3 L. C. L. J. 68, that where a slander exists the court will award exemplary damages. It was also held in this court, in the cause of Brossoit v. Turcotte, decided in June last, that substantial damages might be awarded where no special damages were proved. That case was in some respects similar to this. The injury consisted there in the priest's threatening one of Brossoit's clients with loss of business if he continued to employ Brossoit as attorney. This case appears to me stronger, inasmuch as the threat was made in a more public manner, and accompanied with the assertion that his parishioners would be deprived of privileges which they regarded of a most important nature, if they frequented respondent's shop. This was certainly taking the most direct and effective means to deprive respondent of his customers. There is proof that it had effect. Some of his customers are mentioned, who left respondent, and one witness says his business so diminished that he had to leave the parish. I think the judgment of the Court of Review, awarding against appellant $100 and costs, should be affirmed."

Liability of Clerk of Court for Misfeasance of Office.

STATE OF ILLINOIS v. DODD *ET AL.*

Supreme Court of Illinois, June Term, 1876.

Hon. JOHN M. SCOTT, Chief Justice.
" P. H. WALKER,
" W. K. MCALLISTER,
" JOHN SCHOFIELD,
" SIDNEY BREESE,
" B. R. SHELDON,
" ALFRED M. CRAIG, } Judges.

A clerk of court who, in entering up a judgment, omits to insert the amount of the judgment, by which omission the amount of the same is lost, is liable personally for the amount thus lost by his non-feasance.

C. H. Frew, for appellants; *Gray & Swan*, for appellees.

The opinion of the court was delivered by WALKER, J.

It appears from the evidence in this case that Barr, Johnson & Co., on the 13th day of September, 1872, recovered a judgment against one David W. Moses, but the clerk in entering it up omitted to name any sum for which the recovery was had. The minutes of the judge trying the case shows that the amount found in favor of the plaintiff was $223.03, and the clerk afterwards issued an execution against Moses, and in their favor and for that amount. The sheriff levied on a large quantity of personal property, amounting in the aggregate to perhaps the value of $1,500. This property was taken from the sheriff by writs of replevin, and recovered on trials had, as we infer, upon the grounds that there was no judgment under which the execution could issue; and the plaintiffs having lost their debt, as they claim, by reason of the failure of the clerk to perform his duty in entering up the judgment, brought suit on the clerk's bond against him and his sureties, to recover damages sustained by reason of the *non-feasance* of the clerk.

A trial was had in the court below by the court and a jury, resulting in a verdict and judgment in favor of defendant. A motion for a new trial was entered but, it was overruled by this court before judgment, and the plaintiffs appeal. The record, as presented to this court, strongly tends to show Barr, Johnson & Co. were prevented from collecting their debt solely by reason of the negligence of the clerk to record the judgment pronounced by the court in their favor. Had that been done, it would seem that they could have realized their debt.

This, then, fairly presents the question, whether the clerk is liable for *non-feasance* as well as *misfeasance* or *malfeasance* in office. The statute has prescribed the condition of his bond. And the law provides that it shall be "conditioned for the faithful performance of the duties of his office, and to deliver up the papers, etc., appertaining to his office when required so to do, etc. Now he and his sureties, by the terms of their bond, have engaged and bound themselves that he as clerk shall perform the duties of his office. It is not that he shall not willfully and wrongfully violate those duties, or that he shall not be guilty of *malfeasance* in office. According to the condition of this bond he and his sureties could only escape liability by his faithful performance of his official duty. Their agreement was that they should only escape liability by his performing his duties as clerk. This is the plain and unmistakable meaning of the language. And it seems so clear to us, that we are at a loss to make it more obvious. By it they agree that they shall be responsible if he fails to perform his official duty. And it is for this purpose that the bond is required. He virtually agrees with the people, when he assumes the duties of his office, that he is competent to discharge them, and that he will not be wanting in their faithful performance. If he may omit one duty without liability, why may he not omit all with impunity? We do not have the shadow of a doubt that he and his sureties are liable for any failure to perform an official duty.

The act of the 19th of February, 1859, Sess. Laws, p. 133, provides: "That it shall be the duty of clerks of courts of record in this state, to enter of record all orders, judgments and decrees of their said courts, before the final adjournment of their respective courts, at each term thereof, or as soon thereafter as practicable." This enactment imposes no new duty, but enlarges the time within which it shall be performed. It was a common law duty of a clerk of a court of record, and he was appointed to the office for the purpose of entering upon the roll of the proceedings of the court all of its orders, judgments and decrees, with the issuing of process of the court and the performance of other duties of the office. And the common law practice was, that the proceedings of each day should be so entered as to be read on the next morning, and then signed by the judge. This statute imposed no new duty, but simply declared the common law which had existed from the earliest period when a record of proceedings of the courts of England were had.

Here was a plain duty which no one could mistake. And it appears that it was omitted by the officer who had undertaken its performance; and his sureties had engaged that he should perform, and he and they must be held liable for any loss or injury that has resulted to Barr, Johnson & Co., by reason of its non-performance.

Numerous authorities might be cited from the courts of other states to show that the law imposes the liability, if they were needed to sustain so plain a proposition. All understand that sheriffs, constables and other ministerial officers are held liable for mere *non-feasance* of duty. Sheriffs and constables are not unfrequently held liable, for failing to levy an execution, failing to return it, for permitting property seized on execution to be retaken by the defendant, and in a number of other cases, when loss is occasioned to the plaintiff, by mere non-action, unintentional and caused by mere negligence or omission to perform a duty. And no reason is perceived for making any distinction between such officers and a clerk. The condition of their bonds in this respect are the same, and their liability necessarily should be the same.

The court below, therefore, should have given appellants instructions, so far as they accord with the views here expressed, and it erred in refusing to grant a new trial, and the judgment must be reversed and the cause remanded. JUDGMENT REVERSED.

The Doctrine of "Cy Pres."

HEISS, EXECUTOR v. MURPHY *ET AL.*

Supreme Court of Wisconsin, September, 1876.

Hon. E. G. RYAN, Chief Justice.
" ORASMUS COLE, } Judges.
" W. P. LYON, }

1. Bequest Void for Uncertainty.—Where the testator bequeathed, after the payment of his debts, all his property "to the Roman Catholic orphans of the diocese of La Crosse, state of Wisconsin, and named the bishop of the diocese his executor, giving him power to sell the above property, and use the proceeds for the benefit of the Roman Catholic orphans, *Held*, that this provision in the will was void for uncertainty.

2. Cy Pres in Wisconsin.—The courts of this state are clothed with strictly judicial powers, and have not succeeded to the jurisdiction over charities that the Chancellor of England exercises by virtue of the royal prerogative. The doctrine of *cy pres* is a prerogative or sovereign function, and not strictly a judicial power.

The opinion of the court was delivered by COLE, J.

This is a bill filed by the executor for the construction of the will and for directions in regard to the execution of the trusts created by it. By his will the testator, after the payment of his debts "gives and bequeaths to the Roman Catholic orphans of the diocese of La Crosse, state of Wisconsin," all his real estate of every description, for the same purpose. He then nominates and appoints the plaintiff, who is the Roman Catholic Bishop of the diocese of La Crosse, executor, giving him "power to sell the above property, and use the proceeds for the benefit of the Roman Catholic orphans."

The diocese of La Crosse includes all of the state of Wisconsin north and west of the Wisconsin river, and south of Lake Superior, in which there were, according to the testimony, about 40,000 Roman Catholics, and the number is increasing.

The heirs at law of the testator have put in an answer in which they allege and claim that the provisions of the will are wholly inoperative for the following reasons: 1st. For uncertainty; 2d. That there are no persons or class of persons mentioned in the will to whom the property is devised and bequeathed, that can be ascertained, selected or identified; 3d. That the will does not devise or dispose of any property to any person or class of persons, or to any one; 4th. That the will as to the manner in which the property therein described is devised or bequeathed; as to the persons to whom it is attempted to devise or bequeath the same, and as to the objects for which the same is devised or bequeathed, is uncertain and void as against the heir at law of the testator; and, 5th. That none of the pretended devisees or legatees are persons known to the law, or who in law are capable of taking and holding any devise or bequest. These are the objections urged on behalf of the heirs against the validity of the will, and they appear to us to be unanswerable and fatal.

In the case of Ruth *et al.* v. Oberbrunner *et al.*, decided at the present term, but in the decision of which the chief justice, having been of counsel, took no part, it was held that chapter 84, R. S., abolished all uses and trusts, inluding charitable uses and trusts, except such as were authorized by its provisions and constituted in the manner prescribed. This view would inevitably overthrow the devise and bequest in the will. But our decision in this case will not be placed upon the ground that the will is void under the statute of uses and trusts, for we think, without reference to that question, that it is impossible to sustain the devise under the general principles of law applicable to charitable uses. It will be seen that the devise is *directly*, "to the Roman Catholic orphans of the diocese of La Crosse," while power is given to the executor to sell the property "and use the proceeds for the benefit of the Roman Catholic orphans." Now in whom does the fee of the real estate vest in the devise; does it vest in the Roman Catholic orphans of the diocese, or in the executor, or where does it? It is suggested on the brief of the learned counsel for the plaintiff that the testator did not intend that the fee should vest either in the orphan or in the executor, but this view would seem to be inconsistent with the power conferred. That power was authority to *sell* the property, which implies that the title might be transferred by some one to the purchaser when the contemplated sale should be made. But not to dwell upon this point, we come to a more serious objection against the validity of the devise, and that is the uncertainty as to who are the beneficiaries of the testator's bounty. Conceding that the last clause of the will is to be construed in connection with the previous clause, and that the fund was to be used by the executor for the benefit of the Roman Catholic orphans of the diocese of La Crosse, and how is it possible to ascertain and determine what orphans were intended to be benefited? Are they whole orphans or half orphans? Are they orphans of

parents both of whom were members of the Roman Catholic church, or will an orphan of a Roman Catholic father or of a Roman Catholic mother come within the designated class? Are the objects of this charity the full orphans or half orphans who were living within the diocese at the death of the testator, or will such of either class as may thereafter come into the diocese be entitled to take as beneficiaries? Again, upon what principle, or in what manner, is the fund created by the sale of the real estate to be expended? Is the executor or trustee to apportion it equally among the orphans of the diocese when it is ascertained who are entitled to take, or is he to dispense it in his discretion for the benefit of such orphans as he may select from time to time? These questions suggest the perplexity and difficulties which the court must encounter in establishing and carrying into effect this trust. It seems to us they are insuperable. For the testator has failed to declare his purposes, but has left his will so indefinite and vague upon all these material matters, that a court, in order to execute the trust, is of necessity compelled to make a will for him. The words of Comstock, C. J., in Beekman v. Bonson, 23 N. Y. 298, may well be used: "Here is a fatal uncertainty, both as to the subject and the object of the bequest," p. 306.

But to meet and answer these serious objections taken to the will, the counsel for the plaintiff cites and relies upon a line of adjudications which hold that though the individual beneficiaries of a charity are left uncertain, yet when they are included in a definite class, the trust will be sustained and enforced by a court of equity. And he says, in order that there may be a good trust for a charitable use, there must always be some public benefit open to an indefinite and vague number; in other words, that the persons to be benefited must be vague, uncertain and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being. But the doctrine of these cases will not aid the will, because the class here is not certain and well-defined, nor is there any way provided for selecting the beneficiaries from a class. We have seen that the word "orphan" includes a minor who has lost both of his or her parents; or one who has lost only one. What meaning is to be given to it as used in the will, it is impossible to determine. So that, admitting the full authority of those cases which decide that where the individual beneficiaries under a will are left uncertain but are included in a definite class, the bequest or devise for their benefit will be sustained, still the difficulty here presented remains. How are the particular orphans entitled to have the benefit of the devise to be ascertained and identified? Under our construction of the will there are no means by which this uncertainty can be rendered certain. There are, doubtless, cases in which a devise or bequest to charity as vague and uncertain as the one we are considering has been sustained. But these cases mainly rest upon the doctrine of *cy pres*, which is a doctrine of prerogative or sovereign function, and not strictly a judicial power. 4 Kent, 508; 2 Story Eq. Juris. Section 1169 *et seq;* Fontain v. Revenel, 17 How., 369; White v. Fish, 22 Ct. R., 31; Jackson v. Phillips, 14 Allen, 540-576; Williams v. Williams, 8 N. Y. 525, 528; Owens v. The Missionary Society, 14 Ib. 380-403; Beekman v. Bonson, 310; Levy v. Levy, Ib. 97; Bascom v. Albertson, 34 Ib. 584. It is not claimed that the courts of this state are clothed with other than strictly judicial power, or that they have succeeded to the jurisdiction over charities the chancellor in England exercises by virtue of the royal prerogative and the *cy pres* power. It is admitted that the intention of the testator is to control in administering charitable trusts. But if that intention has been so vaguely and imperfectly expressed that the *cestui que trust* can not be ascertained, the charity must fail. In this case it is impossible to determine from the language of the will who are the objects of the testator's bounty. There are no ascertainable beneficiaries either as a class or individuals, and therefore the trust can not be effectually carried out. It is uncertain whether the word "*orphan*" applies to those children who have lost both parents, or whether it does not include as well those who have only lost one. It is impossible to determine whether the testator intended to restrict his bounty to such of either or both classes as were residents of the diocese at the time of his death, or whether he intended the fund should be used as well for the benefit of any that might thereafter come to the diocese, or become orphans by the death of one or both resident parents. No power is given the trustee to select the individuals from any certain or definite class, so as to render "uncertainty certain and relieve the devise and bequest from the objection arising out of its vague and indefinite character." It seems to us that a trust so wanting in all the elements of certainty and precision can not be enforced by a court acting only in the exercise of purely judicial power. And we think this conclusion is in harmony with the doctrine of the better considered authorities in this country which have passed upon the question. Many of them are cited upon the briefs of counsel, and require no comment. The will being void, it follows that the heirs at law take the property.

The counsel for the plaintiff contended that the trust created by the will was valid as a power, and that the lands descended to the heirs or devisees subject to the execution of this power under section 12, 14, and the subsequent sections of chapter 84. This might remove the difficulty in respect to the title, but does not overcome the objection that the trust is too indefinite to be capable of execution. In the case of Dominick v. Sayre, 3 Sandf. s. c. 555, to which we were referred on this point, the court adopts the maxim "that a power of disposition limited to a class, in all cases implies and creates a trust when the property which is given is certain, and the objects (that is the persons) to whom it is given are also certain," in other words, deciding that, "where this certainty exists the trust arises." It is obvious that the principles of this decision can have no application to the case before us. It results from these views, that the judgment of the circuit court, placing a construction upon the will and giving directions to the executor as to the execution of the trusts, is erroneous.

The judgment is therefore reversed, and the cause remanded with directions to enter judgment in accordance with this opinion.

Admiralty Jurisdiction—Salvage—Maritime Contracts and Services.

SALVOR WRECKING CO. v. SECTIONAL DOCK CO.

United States Circuit Court, Eastern District of Missouri, September Term, 1876.

Before Hon. JOHN F. DILLON, Circuit Judge.

Services rendered in raising the sectional floating docks of the respondent are not the subject of salvage compensation, nor are they maritime, so as to give the admiralty jurisdiction of a suit to recover the value of such services.

This is a libel suit *in personam* for salvage, or for services claimed to be in the nature of salvage services, by the Salvor Wrecking and Transportation Company, against a corporation called the Sectional Dock Company, and against the individual members of that company. The services for which compensation is claimed consisted in work and labor by the libellant's boats and servants, in raising a structure known as Sectional Docks. These docks were constructed about twelve or thirteen years ago. They consist of sections or compartments joined together, each section being a huge water-tight crib or box, so constructed as that they may be sunk, by the admission of water therein, so deep in the river that a boat or vessel needing repairs may stand over them, and on the water being pumped out by means of an engine and pumps (which constitute part of the apparatus), the docks will rise to the surface of the river or a little above it, bearing the boat or vessel to be repaired with them, and sustaining it while the repairs are being made. When the repairs are completed the structure is submerged in the same way, and the vessel thus enabled to leave the docks, which, on being pumped out, rise to the surface of the river. They are intended solely for the repair of vessels, and to prevent the necessity of hauling them upon ways or dry-docks for repairs. They have no motive power of their own, and are not intended for navigation or to be moved about, except to secure a more convenient locality. They are fastened to the shore securely by large iron cables or chains, and have been in this position in the Mississippi river at St. Louis for many years. These docks were originally owned by a partnership known as the Sectional Dock Company, of which some of the individual respondents were members. One of the co-partners died, and under the peculiar provisions of the Missouri statute, administration was granted by the Probate Court of St. Louis County to one Daniel G. Taylor on the partnership property, and the docks passed into the possession of that administrator. While in his possession a portion of the docks, without breaking away from the shore or parting the cables, sunk so deep that they could not be raised by their own pumps, and extraneous aid was needed. The administrator called on the libellants to render such aid. No fixed compensation was agreed upon between the administrator and the libellants, for the reason, as stated by the former, that if when the work was done the libellants should charge too much, the probate court would not allow it. Libellants commenced work about September 27, 1873. On October 29, the work of raising the docks being still in progress, the docks were sold by order of the probate court on the express condition that the purchaser should take the docks in their then condition, and be at any future expense for raising them. The respondent, Thomas, purchased the docks for himself and the other individual respondents, with the exception of Adkins. Shortly afterwards he demanded possession of the docks of the libellants, which he did not obtain, and they continued their work thereon (whether *with* or *against* the consent of Thomas is a disputed question) until the 22d day of November, when the docks were raised and delivered to the Dock Company, the libellants reserving, in a letter accompanying the delivery, their lien thereon for their work and labor. The libellants have been paid about $5,000 by the order of the probate court, which is in fuil for all services up to the day of the sale by the administrator on the 29th day of October. The respondent Dock Company is a corporation which was formed about November 10, 1873, and which organized November 20th, being about the time when the libellants completed their work. This suit is to recover for the services rendered *after* the sale on October 29, and the libel and monition show that it was intended to recover for salvage services, or services in the nature of salvage services. The district court dismissed the libel as to the individual respondents, and adopting the report of the commissioner as to the amount of the compensation, rendered a decree against the corporation known as the Sectional Dock Company, formed and organized as above stated, for the sum of $4,940.

There are cross-appeals. One by the appellant from that part of the decree dismissing the libel as to the individual respondents; the other by the Sectional Dock Company, from the decree against it for the above mentioned sum.

Given Campbell and *T. K. Skinker*, for the libellants; *D. T. Jewett*, for the respondents.

DILLON, Circuit Judge: The respondents make the question in this court that the case, as stated in the libel and made by the proofs, is not one of admiralty or maritime cognizance, and this, whether the libel be regarded as one for salvage or to recover as upon a maritime contract. The libel and monition show that the pleader intended a case for salvage

compensation; but the *facts* are stated, and if the case is not one for salvage compensation, but is one upon a maritime contract to recover for maritime services, the liberal practice of the court of admiralty would probably allow it to be viewed in the latter aspect—more particularly as the objection was not taken until the hearing, if indeed at any time before the case reached the appellate court. The proctors in the cause have referred me to the decisions bearing upon the jurisdiction of the admiralty in cases supposed to be more or less analogous to this one, but it is conceded that none of them are exactly in point; and some of them are conflicting. The law of salvage grows out of navigation, and is intended to promote the interests of those engaged in navigating vessels which are the instruments of commerce and trade, and of those whose property is exposed to the perils of the sea, by awarding liberal compensation to the persons by whose assistance such property is rescued from impending peril or saved after actual loss. Abbott on Shipping, 554. And because such services are connected with navigation and commerce or trade, the court of admiralty has jurisdiction to fix the amount of compensation and to enforce a maritime lien therefor; and such jurisdiction and lien are necessary because the owners of the property saved may be unknown or distant or irresponsible. No such reason or necessity exists in respect to fixed structures, such as these docks. In denying salvage compensation for taking up and securing rafts afloat in public navigable waters, Chief Justice Taney uses language which applies here. He says rafts "are not vehicles intended for the navigation of the sea, or the arms of the sea; they are not recognized as instruments of commerce or navigation by any act of Congress; they are piles of lumber and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and to support it to its destined port. And any assistance rendered to these rafts, even when in danger of being broken up or swept down the river, is not a salvage service, in the sense in which that word is used in the courts of admiralty." Tome v. Four Cribs of Lumber, Taney's Decision, 533.

Assuming that the allegations of the libel are broad enough to justify the court in treating the libel as one to enforce a contract, or to recover compensation upon general principles for the services rendered in raising the docks, I am of opinion that the contract or services do not relate to the navigation, business or commerce of the sea or public navigable waters, in such a sense as to make the contract or services maritime. The admiralty jurisdiction and the peculiar liens, rights and remedies which the admiralty recognizes and enforces, spring out of the movable character of the vessels and vehicles which are the instruments of navigation, commerce and trade. None of the reasons upon which this jurisdiction is founded, and these rights and remedies are given, apply to the stationary docks here in question; and my best judgment is that the controversy between these parties belongs to the courts of common law, and not to the court of admiralty.

The decree below against the dock company is reversed, and the libel dismissed as to all the respondents; but as the question of jurisdiction was not raised until after the proofs were taken, each party must bear the costs he has incurred, except that the costs in this court must be paid by the libellants. DECREE ACCORDINGLY.

NOTE.—By the general admiralty law, maritime contracts include maritime services in *building*, repairing, supplying and navigating ships, and the admiralty jurisdiction in the United States extends to all maritime contracts, *i. e.*, contracts which relate to the navigation, business or commerce of the sea. De Lovio v. Boit, 2 Gallison, 398, 475. The settled doctrine in this country is, that the admiralty jurisdiction extends to all maritime contracts, and "whether a contract be maritime or not depends not on the place where the contract was made, but on the *subject-matter* of the contract;" * * * "the true criterion is the nature and subject-matter of the contract, as to whether it is a maritime contract, having reference to maritime service or maritime transactions." Ins. Co. v. Dunham, 11 Wall. 26, 29.

A contract for *building* a vessel was held to be not a maritime contract, because made on land and to be performed on land. Ferry Co. v. Beers, 20 How. 393, 401. But this decision is not to be extended by implication. Ins. Co. v. Dunham, 11 Wall. 28. Locality of the place where made, as a test of the maritime nature of contracts, is rejected in this country. A ferry boat on the Ohio river may be the subject of a salvage service. The Cheesman v. Two Ferry Boats, 2 Bond, 363. The learned Judge Leavitt in that case expressed the opinion that salvage service could not be restricted to a service rendered to a vessel or the cargo of a vessel, but extended to all cases where valuable property is adrift or afloat, and is rescued from peril on any water over which the admiralty jurisdiction extends. Ib. pp. 372–376. This view he considered to find support in the decisions in which steamboats have been libelled in admiralty for injuries to flat-boats and their cargoes, of which Fritz v. Bull, 12 How. 466; Culbertson v. Shaw, 18 How. 585, and Nelson v. Leland, 22 How. 48, are mentioned as examples. And he adds, "If, in collision cases, jurisdiction in admiralty can be maintained, when the injury is not to a vessel or the cargo of a vessel [not required to be enrolled or licensed], it results inevitably that it may be maintained for a salvage service in saving property not within either of those categories." And he supports his conclusions by pointing out the inadequacy of the drift laws of the states. Judge Nelson was inclined to regard a *canal boat* as not being a boat or vessel, though upon navigable waters, in such a sense as to subject it to a maritime lien for breach of a contract of affreightment. The Ann Arbor, 4 Blatchf. 205, 1858. See similar view, Buckley v. Brown, 3 Wall. 199, 1856, *per* Grier, J.; Jones v. Coal Barges, Ib. 53. But a lighter was held to be subject to the admiralty jurisdiction. The General Cass, 4 Ch. Legal News, 89. So ferry boat. Str. Cheeseman v. Two Ferry Boats, 2 Bond, 363.

The claim of the owner of a ship-yard in hauling up a vessel on his ways, and for the use of the ways, is a claim of a maritime nature, enforceable in admiralty. Wortman v. Griffith, 3 Blatchf. 528, 1856. Nelson, J. But see previous case of Ransom v. Mayo, Ib. 70, 1853, where the admiralty was held not to have jurisdiction of a claim by the owner of the vessel against the owner of the ways, for the negligence of the latter in hauling the vessel up on the ways.

A dismantled steamboat fitted up for a saloon, not subject of admiralty jurisdiction. The H. Hudson, 3 Benedict, 419.

Barge adrift is subject of salvage service. Seven Coal Barges, 2 Bissell, 297. So of a box of bullion. A Box of Bullion, 1 Sprague, 57.

A maritime lien can not exist upon a bridge; and the opinion was expressed in a libel *in rem* against a bridge for a maritime tort, that a lien "could only exist upon movable things engaged in navigation, or upon things which are the subject of commerce on the high seas or navigable waters," such as vessels, steamers and rafts, and upon goods and merchandise carried by them, but not upon anything fixed and immovable, like a wharf, a bridge, or real estate of any kind." The Rock Island Bridge, 6 Wall. 213. But a vessel injured by any obstruction in navigable waters may sue *in personam* in the admiralty,—locality giving the jurisdiction in cases of maritime torts. Atlee's Case, Wall. In Tome v. Four Cribs of Lumber, Taney's Decis. 533, 1853, it was held by Ch. J. Taney that taking up and securing rafts afloat in public navigable waters was not a salvage service, but rather in the nature of a mere finding, citing Nicholson v. Chapman, 2 H. Black. 254, relating to a quantity of lumber, and in which salvage was denied, and the Uduor (a flat boat) 2 Hagg. 3. One ground of the decision of Ch. J. Taney was, that rafts "are not vehicles intended for the navigation of the sea, or the arms of the sea; they are not recognized as instruments of commerce or navigation by any act of Congress; they are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and transport it to its destined port. And any assistance rendered to these rafts, even when in danger of being broken up or swept down the river, is not a salvage service, in the sense in which that word is used in the courts of admiralty." As to rafts, see 1 Abb. Adm. 485, 2 Wm. Rob. 251.

The jurisdiction of the district court over a case of salvage service on the Mississippi river is not questioned by counsel, and does not admit of question. Seven Coal Barges, 2 Bissell, 297, 300, citing The Genesee Chief, 12 How. 443. The Hine v. Trevor, 4 Wall. 555. The Tug Eagle, U. S. Sup. Ct., 1869–70.

Coal barges adrift on the Ohio may be the subject of salvage service. Seven Coal Barges, 2 Bissell, 297 (Drummond, J., Davis, J., concurring).

"The object of the law of salvage is to promote commerce and trade, and the general interests of the country, by preventing the destruction of property, and to accomplish this by appealing to the personal interest of the individual as a motive of action, with the assurance that he will not depend upon the owner of the property he saves for the measure of his compensation, but to a court of admiralty, governed by principles of equity." *Per* Drummond, J., Seven Coal Barges, 2 Bissell, 297, 302, 1870.

Constitutional Law—Killing Stock by Railroad.

KANSAS PACIFIC RAILROAD v. MOWER.

Supreme Court of Kansas.

Hon. C. A. KINGMAN, Chief Justice.
" D. M. VALENTINE, } Judges.
" D. J. BREWER, }

Chapter 94 of the laws of 1874, entitled "An act relating to killing or wounding stock by railroads," is constitutional and valid.

The opinion of the court was delivered by BREWER, J.

In this case the constitutionality of the following act is challenged, and this is the only question presented for our consideration.

CHAPTER XCIV.

An Act entitled "An Act relating to killing or wounding stock by railroads." (Laws 1874, pp. 143 and 144.)

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Every railway company or corporation in this state, and every assignee or lessee of such company or corporation, shall be liable to pay the owner the full value of each, any, (and) every animal killed, and all damages to each and every animal wounded by the engine or cars on such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee or lessee thereof, or not.

SEC. 2. In case such railway company or corporation, or the assignee or lessee thereof, shall fail for thirty days after demand made therefor by the owner of such animal, or his agent or attorney, to pay such owner, or his agent or attorney, the full value of such animal if killed, or damages thereto if wounded, such owner may sue and recover from such railway company or corporation, or the assignee or lessee thereof, the full value of such animal or damages thereto, together with a reasonable attorney's fee for the prosecution of the suit, and all costs in any court of competent jurisdiction in the county in which such animal was killed or wounded.

SEC. 3. The demand mentioned in section 2 of this act may be

made of any ticket agent or station agent of such railway company or corporation, or the assignee or lessee thereof.

SEC. 4. In all actions prosecuted under this act, it shall be the duty of the court, if tried by the court, or jury, if tried by a jury, if the judgment or verdict be for the plaintiff, to find in addition to their general findings for plaintiff, the amount, if anything, allowed for an attorney's fee in the case.

SEC. 5. This act shall not apply to any railway company or corporation, or the assignee or lessee thereof, whose road is inclosed with a good and lawful fence, to prevent such animals from being on such road.

We have been favored with several briefs upon this question, both from counsel for plaintiff in error and counsel representing other railroads. There are quite a number of cases in this court, in which various roads are interested, turning upon this question, and we are informed that there are many more in the several district courts waiting for the decision in this. While the amount in controversy in each of these cases is small, yet the number of cases in suit, and the still greater number which, in the ordinary experience of the management of railroad trains, may be expected to arise in the future, render the question one of considerable moment. It is generally conceded by the counsel, and we think is both settled by the authorities and resting in sound reason, that the legislature has the power to require railroad corporations to fence their tracks, and make them liable for the value of all stock killed by their trains in consequance of a failure to so fence. See as authorities: Fawcett v. The Y. & N. M. R. W. Co., 2 Eng. L. & E. 289 Conn; Bulkley v. N. Y. & N. H. R. R. Co., 27 Conn. 479. *New Hampshire*—Dean v. The Sullivan Road, 2 Foster, 361; Cornwall v. The Sullivan Road, 8 Foster, 161; Smith v. The Eastern R. R. Co., 35 N. Hamp. 356. *Vermont*—Thorpe v. Rutland & Burlington R. R. Co., 27 Vt. 140; Nelson v. Vt. etc. R. R., 26 Vt. 717. *New York*—Corwin v. New York & Erie R. R. Co., 13 N. Y. 42; Staats v. Hudson River R. R. Co., 3 Keyes, 196; Waldron v. Rensellaer & Saratoga R. R. Co., 8 Barb. 390; Bruce v. N. Y. Cent. R. R. Co., 27 N. Y. 269. *Pennsylvania*—Pennsylvania R. R. Co. v. Riblet, 66 Penn. 164. *Illinois*—Ohio & Miss. R. R. Co. v. McClelland, 25 Ill. 140; same v. Brubaker, 47 Ill. 462. *Indiana*—M. & I. R. R. Co. v. Whiteneck, 8 Ind. 217; Indianapolis, etc. R. R. Co. v. Kercheval, 16 Ind. 84; Indianapolis etc. R. R. Co. v. Marshall, 27 Ind. 300; same v. Townsend, 10 Ind. 38; New Albany etc. R. R. Co. v. Tilton. 12 Ind. 3. *Iowa*—Jones v. Galena etc. R. R. Co., 16 Ia. 6. *Wisconsin*—Blair v. Milwaukee etc. R. R. Co., 20 Wis. 254. *Missouri*—Gorman v. Pacific R. R. Co., 26 Mo. 441; Trice v. Hannibal etc. R. R. Co., 49 Mo. 438. *Maine*—Norris v. Androscoggin R. R. Co., 39 Me. 273.

This power is sustained as a part of the police power of the state, a power whose limits are perhaps as ill-defined as any power claimed or exercised by the state. "It is much easier," says Ch. J. Shaw, in Conr. v. Alger, 7 Cush. 84, "to perceive and realize the existence and sources of this power than to mark its boundaries or to prescribe limits to its exercise." It aims to regulate the intercourse of citizen with citizen; to prescribe the manner of using one's property and pursuing one's occupation so as not to trespass on the property or rights of others, and as such, is a power whose necessity and uses grow with the increasing complexities of our civilization, and the increasing diversities in the industries and modes of life. The sphere, therefore, of its operation is ever widening. Every new use to which the forces of nature are put calls for a new interference of this power, that such use may not operate to the injury of others. Probably no single agency has made so large a demand for the exercise of this power as the agency of steam in locomotion. It is by virtue of this power that the state has assumed to regulate the speed of trains, to require flagmen at crossings of streets in populous cities, the blowing of a whistle or the ringing of a bell at places of supposed extra danger, and the erection of conspicuous sign-boards at all crossings of highways, and indeed all the other various measures to secure safety in the necessarily dangerous matter of running railroad trains. In the exercise of the same power the legislature can require railroad corporations to fence their tracks. As police is, according to Jeremy Bentham "in general a system of precaution, either for the prevention of crime or of calamities," so to prevent the injuries which might result to a train full of passengers thrown from the track by a stray animal upon it, a calamity of not unfrequent occurance, the general judgment of the public has been declared that the track should be fenced, and the state has cast the duty of fencing solely on the corporation the running of whose trains gives rise to the danger. It is said by Cooley, in his work on Const. Lim. p. 579, that this power "has been sustained on two grounds: first, as regarding the division fence between adjoining proprietors, and in that view being but a reasonable provision for the protection of domestic animals; and second and chiefly, as essential to the protection of persons being transported in the railway carriages." So in Tice v. Hannibal & St. Jo. R. R. Co., 49 Mo. 438, it is said, "while the protection of property of adjacent proprietors is an incidental object of the statute, its main and leading one is the protection of the traveling public. To insure such protection, *railroads are imperatively required to fence their track*, and the penal liability deemed necessary to enforce this requirement is a matter of legislative discretion." In Ohio & Mississippi R. R. Co. v. McClelland, 25 Ill. 140, "when the safety of persons and property both demand the fencing of these roads, it is no more than the exercise of a reasonable police regulation *to require it*, and to impose adequate penalties to secure a compliance." In Blair v. Milwaukee etc. R. R. Co., 20 Wis. 254, "experience had shown that it was entirely insufficient for the protection of the public to leave the building and maintaining of these fences, so as to prevent such intrusion upon the track, to the sense of duty or interest of the multitudes of proprietors of lands adjoining our long lines of railroads. To remedy this evil and insure the safety of the traveling public, so far as possible in this respect, the act in question was passed, making it *the sole and absolute* duty of all railroad companies to fence and provide their roads with suitable cattle guards."

But, say counsel, this law does not come within the scope of those decisions is not the exercise of that power. That power may impose the duty of fencing the road upon the company, and punish a failure to perform this duty by liability for all injuries resulting therefrom. But here no duty of any kind is imposed. Fencing is not declared a duty; it is only held up as a means of escaping liability, and only the single liability for animals killed. "As long," say counsel, "as the railroad companies pay for the cattle, they are guilty of no breach of their obligations; they can fence or not, just as they please, and the traveling public is in no way benefited." And again, "a law that lays down no rule of conduct, that neither commands, or forbids, cannot be a police regulation." While doubtless there is weight in the suggestions of counsel in this respect, we are disposed to think they overestimate its importance; we think they place too much stress on the form of the enactment, and regard it as unconstitutional legislation to do that by indirection which is clearly constitutional to do directly.

The difference between the concession of counsel and the law is about this. The concession is that it is lawful to say to the railroads, You must fence, or pay for stock killed; the law is, you must pay for stock killed unless you fence. In each case payment for stock killed is the result, non-fencing the condition. In each the liability is the same, and the manner of avoiding liability the same. For though where the command to fence is in terms expressed, a failure to fence *may* carry the liability of the company to a further reach and wider extent, yet it is almost the unvarying rule in such legislation to follow the command with but one expressed penalty, that of payment for stock killed. And conceding the larger results, if the legislature has power indirectly to subject the company to the more extended liabilities, has it not the power directly to impose the lesser and included liabilities? While it seems to us that form of legislation which counsel contends is essential to the validity of such enactment is the better, and approaches the subject in a more correct way, because stating first and in mandatory words what the company must, or at least ought to do, in respect to the manner of its carrying on its dangerous business, and afterwards the penalty for non-compliance, yet we are not prepared to hold a disregard of that form fatal. While generally the protection of the train and its passengers is considered the main ground upon which to sustain this railroad fence legislation, and rightly that should be the paramount consideration, yet the protection of domestic animals, the property of adjoining proprietors, is also laid down as one of the grounds for upholding it. (See the citations heretofore made.) It seems as though our legislature had specially in thought the minor consideration. If so, it may have been because the past experience of railroad matters in this state had called more special attention thereto. Either was a proper subject for its consideration and within its powers. Looking to the legislation of other states, we find much that is kindred in form, and yet has received the approval of the courts. In New Hampshire at one time there was a law in force in terms requiring railroads to fence. A commission to revise the statute included this in their report, but the legislature struck it out, and in lieu thereof enacted that if any railroad should neglect to keep a sufficient fence, the adjoining land owner might give notice, and then if not built, build it himself, and recover of the company double the cost thereof. Here it will be seen that there is in terms no duty of fencing cast upon the company, and the argument is strong, from the change in the law, that the duty had been removed. Still the court held it the duty of the company to fence, and that it was liable for the stock killed if it did not. Dean v. The Sullivan Road, 2 Foster, 316.

In Vermont, Gen. Stat. ch. 28, sec. 78, railroad companies are declared liable for all property adjacent to their roads destroyed by fire from the engines, "unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury;" and this is approved in G. T. R. W. Co. v. Richardson, U. S. Sup. Court, 3 CENT. L. J. 353. In Massachusetts is a much stronger statute. "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines; and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf." Gen. Stat. ch. 63, sec. 101. This law has been sustained in Hart *et al.* v. Western R. R., 13 Neb. 99; Lyman v. B. & W. R. R., 4 Cush. 288; Ross v. B. & W. R. R., 6 Allen, 87; Ingersoll v. S. & P. R. R., 8 Allen, 438; Perley v. Eastern R. R., 98 Mass. 414; Safford v. B. & M. R. R., 103 Mass. 383; Pierce v. W. & N. R. R., 105 Mass. 199. In the case in 98 Mass., the court say that "the liability of this railroad is not at common law or dependent upon the defendant's want of care." In that in 8 Allen "the legislature has chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." And again, in the case in 4 Cush., "the right to use a parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations and impose such liability for injuries suffered from the mode of using the road as the occasion and circumstances may reasonably justify." A similar statute was recognized as valid in Adden v. White Mts. R. R., 55 New Hamp. 413, and another was sustained in Chapman v. A. & St. L. Rd., 37 Maine, 92; Pratt v. A. & St. L. Rd., 42 Maine, 579. These cases are in principle very strongly in point. An additional liability is in terms directly and absolutely imposed upon the company, a liability which they cannot, as

in the case before us, by any means avoid, but to compensate for which they are given an additional privilege. If in lieu of the privileges given by the 5th section of our statute the companies were given an insurable interest in the cattle along the line of their road, the parallelism would be very close. And this insurable interest is granted to the companies as the only equivalent for the added burden, and it is something which they may or may not avail themselves of. The burden they may not avoid, the insurance they may use or not as they choose. So here the burden is absolute; the stock must be paid for; the fencing is discretionary, though unlike the law in Massachusetts, the privilege if used will avoid the burden. But in Indiana we find authority still more closely in point. Their stock law is, so far as any question here is involved, precisely like ours. It imposes the liability directly, and then declares that the liability shall not rest upon any company that securely fences its road. The supreme court of that state have frequently passed upon that statute, and uniformly sustained it. See the cases heretofore cited in Indiana. We conclude, therefore, upon both reason and authority, that the act before us, is as to its essential elements, at least within the scope of the legislative power. And that is in this direction the limit of judicial inquiry. All further questions must be considered and passed upon elsewhere. Some minor matters are also presented which require a brief notice. It is insisted, first, that this act cannot apply to the plaintiff in error because it holds under a charter granted by the territorial legislature, and, therefore, now incapable of change without its consent. But the chartered rights of a corporation are not more sacred than the individual's rights of person and property, and all must give way to any legitimate exercise of the police power of the state. In Nelson v. Vt. & C. R. R. Co., 26 Vt. 717, it is said: "It is certain, we think, that the legislature cannot impose new burdens upon corporations under such circumstances, which are merely and exclusively of private interest and concern and which have nothing to do with the general security, quiet and good order. But there can be no doubt they have the same right by general legislation over these corporations which they have over natural persons. By general laws they may require them to conform to such regulations of a police character as they may deem for the security of the rights of citizens generally, and most conducive to quiet and good order, and the security of property and even the life of animals." See also Thorpe v. R. & B. R. R. Co., 27 Vt. 140; Lyman v. B. & W. R. R., 4 Cush. 288; Pratt v. A. & St. L. R. R., 42 Maine, 579; Morris v. Androscoggin R. R., 39 Maine, 273; Bulkley v. N. Y. & N H. R. R., 27 Conn. 479.

Again it is said that that section giving to the stock owner the right to recover attorney's fees is unconstitutional. The proposition is thus stated by the learned counsel for plaintiff in error. "Our state constitution guarantees to all equality of rights (sec. 1), and remedies for injury by due course of law (sec. 18). We contend that a law which gives a successful plaintiff in a civil action his attorney's fees, and denies them to defendant, is a most gross violation of these constitutional provisions." We do not think the contention of counsel can be sustained. While the law may be harsh and rigorous, and yet its rigor may have seemed to the legislature as essential to its value, for if a claimant for stock killed was compelled to pay his own attorney's fees it might well happen that in all cases the amount of his claim—such amount being uniformly small—would be consumed by attorney's fees, and so the claimant be in no better condition than before, we see no reason to hold it beyond the power of the legislature. It is no uncommon thing for legislatures to provide in cases where a failure to pay seems to imply more than ordinary wrong, that such failure should carry with it something of the nature of a penalty. Sometimes double or treble damages are given. The Iowa stock law gave double damages. Our trespass act provides for both treble and double damages. Gen. Stat., page 1095-6. Ten per cent. may sometimes be added, in the discretion of the court. Other illustrations might be suggested. Some other matters are suggested, but is is unnecessary to prolong this opinion.

We are of opinion that the act is constitutional, and applicable to the plaintiff in error. The judgment will, therefore, be affirmed. It is understood that the cases of the same plaintiff in error v. Israel M. Tolls, and same against E. J. Hopper, and the case of the L. L. & G. R. R. Co. v. H. M. Waters, involve only the same question, and the judgments in those cases will be affirmed.

All the justices concurring.

Restraining Collection of Taxes—Premium Reserve of Insurance Company.

ALABAMA GOLD LIFE INSURANCE CO. v. LOTT.*

Supreme Court of Alabama, August, 1876.

Hon. R. C. BRICKELL, Chief Justice.
" T. J. JUDGE, } Judges.
" A. R. MANNING, }

1. What is the Premium Reserve of Insurance Company.—The premium reserve fund of an insurance company is the amount set apart by the company, for the payment of losses accruing from deaths of its policy holders. The amount of this fund depends upon the amount of the policies outstanding, and is the present value of such policies, or what is equivalent thereto, the sum that is required to safely insure them.

2. Premium Reserve Exempt from Taxation.—Under a statute which declares that "the indebtedness of the taxpayer shall be deducted, and the excess only shall be taxed," the premium reserve fund of an insurance company is exempt from taxation.

3. Construction of State Constitution.—The taxation of credits secured by mortgages of property is not in conflict with the clause of the state constitution which declares "that all taxes levied on property in this state shall be assessed in exact proportion to the value of such property." People v. Hibernia Savings Institution, 3 CENT. L. J. 260, distinguished.

4. When Injunction to Restrain Collection of Taxes will be granted.—The rule of the Supreme Court of The United States, in Taylor *et al.* v. Secor *et al.*, 3 CENT. L. J. 340, "that in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors of excess in valuation, or hardship or injustice of the law, or any grievance which can be redressed by a suit at law, either before or after the payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax," followed.

Appeal from the Chancery Court of Mobile county, dismissing bill and demurrer.

Boyles & Overall for appellant; *W. Rapier, Esq.*, for appellee.

The opinion of the court was delivered by MANNING, J.

Appellant in this cause filed a bill for an injunction to restrain appellee, tax collector of Mobile county, from collecting certain state and county taxes, assessed against it, for money lent and solvent credits for the years 1871, 1872 and 1873; and alleging that it had "paid the tax on its capital stock and real estate, and all other taxes which said company is legally liable to pay to said state and county for each of said years."

The assessments complained of are alleged to have been made by the assessor in the latter part of the year 1873, "as for escaped subjects of taxation" of said years, and to consist of charges for money lent and solvent credits of the company, to the amount of $200,000, for the year 1871, with a tax thereon of 1 05-100 dollar per $100, and of $274,500 for the year 1872, with a tax thereon of 1 15-100 dollar per $100, and of $300,000 for the year 1873, and a tax thereon of 1 40-100 dollar per $100; which taxes amounting together to the sum of $9,461 21-100. The bill alleges that the defendants, Lott, as tax collector, is proceeding to collect by levy on the office furniture of complainant, necessary to the carrying on of its business; whereby, if defendant be not restrained, complainant will suffer irreparable loss. It is further alleged that this furniture is not of sufficient value to pay said taxes, for which reason seizure will be made of other personal property by the sheriff which will make necessary a multiplicity of suits for trespass against him; and that complainant apprehends a levy will be made on its real estate also, which, with the consequent sale, will create a cloud on the title; wherefore an injunction is prayed. The bill also sets forth that 'Orator declined to render an account of money loaned and solvent credits to said assessor for taxation, on the ground that after deducting from the company's assets its non-taxable property and its indebtedness, as shown by exhibits, there was no excess left for the purpose of taxation, and that your orator then and now contends it had a right to do. The exhibits were made out several months ago, and were submitted to and made known to said assessor and collector, yet they still insist on claiming from your orator said large sum of money, and the said collector has levied," etc. The bill making these averments was sworn to, and the injunction granted June 19th 1874.

The exhibits are statements of the assests and liabilities of the company for the years 1871, 1872 and 1873 respectively. Taking, for an example, the last, it shows assets to the amount of $753,581 33-100, and liabilities to the amount of $669,906 05-100. Deducting from the former the amount of stockholders' notes for capital not paid in (which is not taxable under the revenue act) and from the liabilities the capital stock subscribed, put down at $200,000, as not proper to be included in the statement for the purposes of this suit, and we have assets exceeding $600,000 and liabilities less than $470,000 in amounts.

From the items composing these sums, complainant's counsel make statements as follows of what they contend are non-taxable assets, and of what they admit to be taxable assets, and then of what they insist is the indebtedness of the company, which (they maintain) should be set off against the taxable assets only.

And thus they argue that as the indebtedness exceeds the amount of the taxable solvent credits by over $222,000, there is no excess of money lent and solvent credits liable to taxation under the clause of the act of 1868, which subjects thereto "all money loaned and solvent credits from which credits the indebtedness of the taxpayer shall be deducted, and the excess only shall be taxed." Revenue Act of 1868, Sec. 6, Clause 20.

NON-TAXABLE ASSETS FOR 1873.

Bonds of the State of Alabama	$ 18,462 50
Deferred Premium Notes	13,406 11
Loan Premium Notes	78,900 83
New Premiums	75,338 55
Renewal Premiums	69,008 32
Cash deposited in Mississippi	7,847 53
Cash on hand	31,147 96
Due on Capital Stock	9,310 00
Capital Stock invested in real estate	26,368 46
	$329,790 26

TAXABLE ASSETS FOR 1873.

Money loaned on mortgage	$124,101 05
Otherwise secured	108,316 14
Due from other Insurance Companies	4,500 00
Open accounts unpaid	4,074 41
Interest due the Company	4,630 69
Rents due the Company	480 00
	$246,102 29

* For the report of this decision we are indebted to G. Y. Overall, Esq., of Mobile, Ala.

INDEBTEDNESS OF THE COMPANY FOR 1873.

Due Banks and Bankers	$ 19,000 00
Agents on account	26,462 90
Other parties	238 24
Death Losses unpaid	35,239 91
Premium Reserve	388,965 00
	$469,906 05

Excess of indebtedness over taxable solvent credits for 1873, $222,801 31.

If it be admitted that the bonds of this state, owned by this company, the capital stock invested in real estate (which is taxed as such), and other items in the first of the foregoing statements, are not taxable as solvent credits, it does not follow that the indebtedness in such a case as this is to be set off only against the *taxable assets*. In getting to a correct conclusion respecting this matter, it will be most convenient to look first at the last statement of what is represented as the indebtedness of the company. The chief item in this is called the "premium reserve" of $388,965.

The bill sets forth "that the business of the company is life insurance; that in order to secure the holders of policies issued by it, the money received from them for premiums from year to year, over and above its actual expenses, is invested in bonds, promissory notes, loans and mortgages on real and personal property, drawing interest. These solvent credits are called a "*reserve funds*," held by said company to pay losses accruing from deaths of its policy holders." This is the same fund that is called in the exhibit "*premium reserve*."

The amount of this fund depends upon the amount of the policies outstanding payable in the future—generally soon after the death of the persons on whose lives they are given,—and is determined by men skilled as actuaries, who ascertain, according to certain rules or methods of computation, what is at any time the present value of all such outstanding policies, or, what is equivalent thereto, the sum that is required to safely re-insure them. And this sum or value representing what all the policies are worth at the particular time—or what other insurance companies would charge for taking the same risks—is the measure of the company's indebtedness at that time to its policy holders, and is habitually set down in the annual or other periodical statements required in many of the states by law to be made of the assets and the liabilities of life insurance companies, as an item, and the principal item, of present indebtedness. The amount of the liabilities upon all the outstanding policies is, of course, many times greater. And by unusual mortality in a particular year, the losses of a company might amount, and its indebtedness be increased, to a larger sum than its estimated "reserved fund."

But this fund is doubtless generally adequate, and the method of ascertaining it is probably as accurate as any that can be devised under the direction of the court, or be used by a company desirous to do right, of determining the amount of its present indebtedness at any particular time. And we may remark, that it is much easier to estimate the present value in gross of the policies on a larger number of lives in which an average may be proximately obtained, than to compute such value of each numerous outstanding policies singly, according to the age and state of health of the persons on whose lives they are respectively insured, in order to determine how much shall be paid to the several holders of them out of the funds of a life insurance company that has failed and is in course of settlement. These latter were the problems to be solved *In re* English Assurance Company, Holditch's case. Law Rep. 14, Eq. 72; and others in the English Courts. See 3 Bigelow's Life and Acc. Ins. Co's. Rep. 272.

A life insurance company, therefore, when its solvent credits are assessed for taxation, under a statute which declares that from them "the *indebtedness* of the tax payer shall be deducted, and the excess only shall be taxed," ought to be allowed to have deducted therefrom its "premium reserve." Unless this be done, an invidious discrimination will be made against institutions which it can not be supposed the legislature intended to tax out of existence.

But it can not be admitted that this fund shall be set off only against that part of the property and assets which the counsel of appellant represent as all that is taxable, or that their statement correctly sets forth what things are taxable and what not. For it will be apparent, from what we shall presently say about the manner in which the deferred premium notes and other like credits are secured, that they must be regarded as "solvent credits," under the revenue act, quite as legitimately as "bonds and mortgages."

The "reserve fund" consists of premiums invested in state bonds, in promissory notes, secured by the company's policies on the lives insured, in the notes called "loan premiums notes," "deferred premiums" and renewal premiums," etc., as well as in bonds secured by mortgages; and the payment of them is as effectually secured by the policies as they would be by mortgages. If they were not, the money they represent would not be put at hazard on such securities. And while the fund thus invested is allowed to the company as an indebtedness to be deducted, the amount of it, as an accurate representation of the present value of all the outstanding policies, varies as the sum total of these is increased or diminished by additions or forfeitures of the policies, or otherwise. And if any of the "deferred premium notes," or other similar credits for which the policies stand as sufficient securities, are not paid, the company is a gainer thereby, since there is a corresponding larger reduction of its indebtedness by the consequent forfeiture of policies.

Our conclusion, therefore, is that the sums due by credits of the class specified, and in fact all the available assets except the state bonds, and the sum invested in real estate, taxed as such, and the other capital paid in, which is taxed as paid-up capital, and other assets that are otherwise taxed, and except, also, real property not in Alabama, must be set off against the reserve fund which is invested therein, and the other indebtedness of the company; and that the excess of those credits over the indebtedness is the sum to be assessed as "solvent credits subject to taxation."

We have not overlooked the argument of counsel for appellant, that the credits of the company secured by a mortgage on lands that are taxed are not themselves taxable, because this would be duplicate taxation; and we have examined the interesting case to that effect, referred to in support of the argument, in which the Supreme Court of California held that such taxation was prohibited by the constitution of that state. But why do counsel restrict the proposition to credits secured by mortgages of property? If a credit not so secured might properly be taxed, the fact that there is a mortgage to support it does not render it less fit to be taxed. It would seem that it should be so, because the value of it is thereby made more definite and stable. And in either case the debt must be paid out of the taxed property of the debtor. The reasoning on the subject and the case cited also, go, as they logically must, to the extent of maintaining that taxes should not be imposed at all on a mere credit, a *chose in action*, a thing in right but not in actual possession, because such credit must be paid in money or some other tangible property which is taxed.

It may be that by some subtle process, all the taxes that are charged against the lender of money or seller of property, for the amount which the borrowers or purchasers owe him therefor as "solvent credits," get back and fasten themselves upon their property; and it may perhaps be true, that the highest public interest would be promoted (as has been very ably contended) by assessing all taxes upon the real estate of a country. There is something striking in the illustrations used to show that to tax credits is a false and oppressive policy. For instance, the advocates of such views say: "Suppose, what would be possible in theory, that the necessities of government required a tax of 100 per cent. on all values, or, what would be the result of such a tax, an appropriation of all the property in the state: it is plain that the state would receive no benefit from evidences of debt, due by some of her citizens to others, and payable out of the tangible property which the state had already taken." Admit this to be so, yet, so long as such a state of things is only "possible in theory," and the tangible property of the country is actually distributed among the people, and one man is indebted to another among them, and so long as incomes (generally equally as large if not larger) are received by the creditor class from their credits, as well as by the property-holders from their property, it will not be possible to convince the latter, even (perhaps we should say especially) the debtors of that class, that it would be either just or expedient to tax property from which their incomes are drawn, and not the credits from which the incomes of the creditors are derived. It should be remembered also that the taxes being regarded as the contributions of the people for the support of the state, must be assessed on such subjects of taxation as the people by their representatives choose to designate; and they have chosen, during the whole period of our history, to say that credits, or the money that the creditor class have out upon interest, shall be subject to taxation as well as the tangible property which, by the employment of labor and skill, is made to return valuable products for its owners.

Moreover, in the opinion of a vast majority of the people such an adjustment of the burdens of supporting government would be regarded as justified more nearly than the other suggested, by one of the accepted maxims of policy laid down by the celebrated author of "Wealth of Nations," to-wit: "That the subjects of every state ought to contribute to the support of government as nearly as possible *in proportion to the revenue which they respectively enjoy* under its protection." Cooley on Tax. p. 6.

We are not undertaking to support or controvert any theory of political economy. The point made in argument by counsel for appellant is, that the taxation of credits secured by mortgages of property is illegal and void. In support of the argument they cite a case in which the Supreme Court of California hold, that such a revenue act violates a provision in the constitution of that state, that taxation shall be equal and uniform throughout the state, and all property in the state "shall be taxed according to its value." People v. Hibernia Savings Institution, 3 CENT. L. J. 260.

Our object is only to show why we can not put a like interpretation on the similar clause in our constitution, declaring "that all taxes levied on property in this state shall be assessed in exact proportion to the value of such property." We think this was not understoood by the convention or the people in that sense. And we adopt the observations of Judge Cooley made in reference to the case above cited (in his book on Taxation, p. 160). "It can not be too distinctly borne in mind, that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances: and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws, while equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical," and we may add, it must seem to the great body of the people to be just, or it can not be stable.

The appellee insists that independently of the merits or demerits of complainant's case, the decree of the chancellor dismissing its bill should not be affirmed, for the reason that it is a cause to restrain the collection of taxes, which a court of equity ought not to maintain. Such suits are not regarded with favor. A chief reason for this is of a public and political nature.

"It is upon taxation that the states chiefly rely to obtain the means to

carry on their respective governments; and it is of the utmost importance to all of them, that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers on whom the duty is devolved of collecting the taxes, may derange the operations of government and thereby cause serious detriment to the public." Dow v. Chicago, 11 Wall. 108. "How could a government calculate with any certainty upon the revenues, if the collection of the taxes was subject to be arrested in every instance in which a taxpayer or tax-collector would make out, *prima facie*, a technical case for arresting such collection?" Eve v. State, 21 Geo. 50; Cooley on Taxation, 537. The Supreme Court of the United States has several times expressed its opinion on this subject. The latest occasion for doing so was afforded during the term of that court lately adjourned, in the Illinois Railroad Tax Cases. Taylor *et al.* v. Secor *et al.*, and others, in which the companies concerned sought to restrain officers of Illinois from enforcing what was deemed the oppressive taxation of that state. The opinion delivered by Mr. Justice Miller is reported in 3 CENT. L. J. 340. In it, among other things, he says: "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice, nor irregularity, of themselves give the right to an injunction in a court of equity. "Several cases are here cited. * * * * "That there might be no misunderstanding of the universality of this principle, it was expressly enacted in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Revised Statutes, § 3,224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared, if courts of justice could in *any case* interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means, against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice."

This may be too strong a declaration against the interference, in any case, of the courts or even of a court of equity, by injunction, with the collection of taxes. And the enactment referred to (a similar one to which exists in Georgia) savors of somewhat arbitrary restraint upon the exercise of a judicial function which might sometimes be well exerted to protect the citizen from official oppressions and fraud. But even when no statute prohibits this from being done, a chancellor ought not to interfere, unless the complainant show he is manifestly entitled to its aid. We adopt the views on this subject expressed by Justice Miller, in the same opinion, as follows: "We do not propose to lay down any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors of excess in valuation, or hardship, or injustice of the law, or any grievances which can be redressed by a suit at law, either before or after the payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One reason why a court should not interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax, or to make a new assessment, or to direct another to be made by the proper officers of the state. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitution of all the states, and by the theory of our English origin, is exclusively legislative. Heine v. Levee Com'rs, 19 Wall. 660. A court of equity is therefore hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment, on any principle it may decide to be the right one. In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax, if imposed in the proper time."

Hence, another rule must be observed when cases of the kind under consideration, that have merits to commend them, are brought into court. Before complainants seek the aid of the court to be relieved of excessive taxation, they should pay what is due. "It is a profitable thing (says Justice Miller in the opinion above mentioned) for corporations or individuals, whose taxes are very large, to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that only a part of the tax should be peremptorily enjoined, submit to pay the balance. * * * This is not equity. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed, of a receipt in full for all the taxes assessed." To the same effect is the case of Mayor etc. of Mobile v. Waring, 41 Ala. 139.

According to the principles embraced in the passages quoted above, complainant did not make out a proper case for the interposition of a court of equity. The averments of irreparable mischief, multiplicity of suits and cloud upon the title, though ingeniously framed, could be equally well made in any suit of the kind. All the difficulties here suggested might have been avoided by paying the tax under protest; after which the money, if illegally exacted, could have been recovered back by an action at law, without any serious injury, so far as the bill discloses, being inflicted on the company.

It further appears that some amount of taxes was due from complainant, which it had not paid or offered to pay. The averment that it had "paid the tax on its capital stock and real estate, *and all other taxes which said company is legally liable to pay*," is at the close of it, an averment of a legal conclusion only and not of facts. It ought to have set forth a statement of particulars, which would enable the court to see whether the legal conclusion was correct according to the facts. There was also a failure of duty on the part of complainant (as taking the bill most strongly against it, we infer) in declining to render any statement when demanded, or in due time, of its solvent credits; whether the fact that the assessment was for escaped subjects of taxation of former years would make this delinquency a less serious matter than it otherwise might be, we need not stop to enquire.

The view we have before expressed will probably enable the parties to come to a just settlement.

The decree of the chancellor must be affirmed.

Book Notices.

WILD'S JOURNAL ENTRIES.—Journal Entries under the Codes of Civil and Criminal Procedure of the State of Ohio, and the Acts Supplementary thereto, also under the several Statutes Regulating the Mode of Common Proceedings, with notes of the Decisions of the Courts of Ohio, and some of the other States, touching Journal Entries. By EDWARD N. WILD. Cincinnati: Robert Clarke & Co. 1876.

This book will be found of great value to attorneys and clerks of courts. The forms here given are such as are not to be found in the ordinary books of forms heretofore published. The drawing of journal entries is frequently extremely puzzling to the young practitioner; they are not taught in the law schools, and a thorough training in the office of a practising attorney is not usually a part of a student's education in many of the states. This volume follows to a great extent the Ohio code. The work contains about five hundred and fifty different forms, arranged as follows: 1. Journal entries under the Ohio Code of Civil Procedure; being the entries under every section of the Code, that calls for an order or judgment of common pleas court, arranged *seriatim* under the title chapters and numbers of the sections authorizing them. Each entry is headed with its own independent number, the number of the section of the code authorizing it, with the subject of the entry in italics. 2. All the Journal Entries, arranged as above, under the various statutory proceedings relative to Assessment for Street Improvements, Alimony, Arbitration, Bastardy, Change of Name, Contempts of Court, Divorce, Dower, Mechanics' Lien, Naturalization, Occupying Claimants, Partition, Removal of Case to Circuit Court, and Wills. 3. Journal Entries in the District Courts of Ohio, including proceedings in Quo Warranto, Mandamus, Habeas Corpus, Procedendo, and on Error and Appeal from the lower Courts. 4. Such entries as are peculiar to the Superior Court of Cincinnati. 5. Journal Entries under the Code of Criminal Procedure of Ohio, formed and arranged as under the Civil Code. 6. Exceptions on Bills of Exceptions, Form of Mandate, Rules Supreme Court of Ohio. In addition to the forms, various points of practice, with full notes of decisions by the Supreme and other Courts of the State in any way bearing upon the form of journal entries, are given in the text of the book and in the foot-notes. The index and table of contents are exhaustive, and the arrangement of the work excellent. We have no hesitation in recommending it to the profession.

LEGAL RECREATIONS.—The Law of the Road, or Wrongs and Rights of a Traveler. By R. VASHON ROGERS, JR., a Barrister-at-Law of Osgoode Hall. San Francisco: Sumner Whitney & Company.

This is the fourth volume of this charming series of legal recreations, and comes to us from the Dominion of Canada, *via* the Pacific Slope. It is difficult to properly designate this little volume; it is an unknown and yet unnamed comet on the legal sky. It is not a novel; at least a novel reader would not so call it, for it has no plot, and there is neither love nor murder in it. It is not a law book; the student of Fearne on Contingent Remainders would scarcely so name it. Yet after all it is what its title claims, the law of the road, written in a style which all may understand, and stripped of legal verbiage and technicalities. The author has collected all the leading cases on the subject in England, Canada and the United States, and has forced the splendid but exclusive library of Osgoode Hall into service for the benefit of the general public.

The plan of the work is quite novel. The author is sitting at breakfast on New Year's morning, when his wife rushes into the room to tell him that his servant has driven his sleigh into a neighbor's cutter. Knowing that he had not sent the servant on any errand he is not uneasy, remembering McManus v. Crickett, 1 East, 106, and Shendan v. Charlick, 4 Daly, 338. But his wife's reminder that she had sent the servant herself, alters the case, as he is aware "that if the servant was driving on his master's business it matters not that he disobeyed his express orders in going out of his way, or made a detour to please himself." Joel v. Morrison, 6 C. & P. 501; Seymour v. Greenwood, 7 H. & N. 356. In the same way a sleigh drive is made the opportunity for an exposition of the law in regard to the rights of the road, driving on Sunday, sidewalks, impassable roads, snow-drifts, unsafe bridges, shying horses and runaways. A journey in a stage-coach reveals the law broadly, that "everything must be sound and every one careful." A journey by rail is taken, and the rules

as to liability for accidents, tickets, stations, crossings, luggage, checks, eviction, non-payment of fare, due care and negligence, are given in the most readable manner. As an example, our travelers are crossing in a ferry boat. One of the parties complains to the ferry man: p. 69.

"'You ought—you should—you are bound by law, to have your boats, and your ships, and your landing-stages, and everything else, safe and secure, not only for passengers, but also for their horses and carriages, luggage and merchandise. (Willoughby v. Horridge, 12 C. B. 751.) And you are liable for any damage happening to a vehicle, or the horses, as soon as they are on board, although the driver still keeps charge. (Fisher v. Clisbee, 12 Ill. 344).' The latter part of the remark seemed called forth by the coach having begun to slip backwards towards the water.

"'That thar is open to argument,' said the boatman, 'I guess I knows my business. Some old judges say that a ferryman is not liable unless the animals be put in his charge. (White v. Co., 7 Cush. 155). Nor where the driver don't take care. (Wilson v. Hamilton, 4 Ohio St. 722.) Nor yet where the critters are so spry that they keant be trusted on a boat. (Fisher v. Clisbee, *supra*). Which I calkerlate them thar nags ain't.'"

But perhaps the best example we can give of the amount of research this volume evinces, is the following, p. 243. The author's wife having gone on a journey, writes to him in relation to the loss of some of her baggage *in transitu*, and in his answer he lays down the law as follows:

"Besides what I have already mentioned, if you are a sportsman you may take a gun: if a disciple of the gentle Isaac Walton, the necessary *instrumenta bella*. (Hawkins v. Hoffman, 6 Hill, N. Y. 589.) If you are a joiner—I don't mean a parson—you may take a reasonable amount of tools with your clothes, although perhaps you can't, for in Pennsylvania a carpenter was permitted to carry a reasonable amount of his tools with him (Porter v. Hildebrand, 14 Penn. St. 129), while in Ontario, a brother of the same craft was not (Bruty v. G. T. R. 32, U. C. Q. B. 66), the judge thinking that a blacksmith might just as reasonably expect to carry his forge, or a farmer his plow, as part of his baggage. You may take new clothing and materials for yourself and family, though not for others. (Dexter v. S. B. & N. Y. R. R., 42 N. Y. 326.) If you are of a nervous disposition and desire to defend yourself against thieves and robbers, you may take a pocket pistol—don't suppose I mean a brandy flask; if you are a bellicose man of honor, a couple of duelling pistols will be allowed (Woods v. Devon, 13 Ill. 746) or even a gun (Davis v. C. & S. R. R., 10 How. Prac. 330), although in Maryland one was not allowed to take a Colt. (Giles v. Fauntleroy, 13 Md. 126). A theatre goer may take an opera glass (T. & W. R. R. v. Hammond, 33 Ind. 379); a student on his way to college, manuscript necessary for the prosecution of his studies (Hopkins v. Westcott, 7 Am. Law Reg. N. S., 533); but an artist can not carry his pencil sketches as luggage in England (Mytton v. Midland, Ry. 4 H. & N. 615); although Cockburn, C. J., thought he could, and his easel as well. (Macrow v. G. W. R. R., L. R. C. Q. B. 622.) Wilson, J., in a Canadian case, thought that one musically inclined might take a concertina, or a flute, or that instrument in the playing of which a western writer says: "the resined hair of the noble horse travels merrily over the intestines of the agile cat" (Bruty v. G. T. R. R. *ante*), but fortunately for mankind the majority of the court held otherwise."

The professional man will find the perusal of this work both refreshing and useful. The tourist will find it more entertaining than a time-table and a great deal more trustworthy.

Selections.

THE SUPREME COURT OF ILLINOIS—THE AMOUNT OF WORK REQUIRED OF IT—THE MANNER IN WHICH THE WORK IS DONE—ABSURD AND CONTRADICTORY JUDGMENTS—A REMEDY SUGGESTED.—A late issue of the Chicago *Tribune* contains the following interview between a leading lawyer of Chicago and a reporter of that paper:

Reporter.—"The supreme court of the state meets to-day?" "Yes, in Ottawa, in LaSalle county, a place on the Chicago & Rock Island Railroad, 84 miles from Chicago, 44 miles from Joliet, where the Chicago, Alton & St. Louis Railroad crosses, and 10 miles from LaSalle, the crossing of the Illinois Central. It may be reached, also, by a branch of the Chicago, Burlington & Quincy Railroad."

"How do the judges get there?" "By sinuous routes, more tedious than a trip to New York, Philadelphia, or Baltimore, four of the judges will reach their place of labor."

"What is the power of the court?" "This court possesses the supreme judicial power of the state. As the laws now stand, there is no case so small that it may not be carried there for final decision, and none so large that this court may not control it."

"Has it really all this power?" "In exerting this power, it can determine the law for all the courts and all the people of the state; and, considering that this is the fourth state in the Union, the immense responsibility and power of the court is apparent."

"How is the court constituted?" "The court consists of seven judges, chosen from all parts of the state; four constitute a quorum, and the concurrence of four judges is required for every decision."

"Do you know the character of the cases presented this term, and how many will be tried?" "At this term about 700 cases will be presented, involving almost every variety of legal question which should be determined by this court for all time. It is rumored that the judges have decided to hear but a small part of these, leaving the rest to fall behind till the next year, and that henceforth this court will be hopelessly behind in decisions, as has been the case in New York and the larger states."

"Is not this decision disastrous to the litigants?" "It is, perhaps, to be regretted that the court had not adopted this determination many years ago. Last year it took for decision nearly 1,250 cases. When the court convened at Mount Vernon in June, 150 of those taken at Ottawa a year since had not been considered at all, and hundreds more taken before that time had not been decided. The inconvenience of delay to the parties is not equal to the great injustice done to many by the ill-considered judgments rendered to dispatch business; and the individual wrong does not equal the damage to the commonwealth by the destruction of its jurisprudence from the same cause."

"How are the decisions of this court generally respected?" "Even at home, in the United States Circuit Court, Judge Drummond has repeatedly stated that he had very little respect for the decisions of the court. In the law-libraries throughout the United States its reports are seldom found; even Alabama, Texas and Arkansas reports are considered better authority."

"What can be the reason for such a state of things?" "The reason is palpable; indeed, the result of the hasty practice could not be other than to destroy jurisprudence. No court of last resort can wisely decide 200 cases or questions of law in a year, so that the decisions may announce the law on a point as the rule of the state for all time. Yet that is what these courts are for, and is the object of reporting their decisions."

"How do they decide 1,000 cases a year?" "It is understood that to get along with the work one or more of the judges examine each case, and the others rely mainly upon the examination, and give a formal acquiescence in the decision of the one who examines the case."

"Is there any evidence of this practice other than rumor?" "An instance noted in the *Tribune* of March 22 last seems to form evidence of such a practice. In the 67th Illinois Reports two cases were decided on the same instructions. In one case the court decided that the instruction violated the law, in the other that it conformed with it; both decisions being given at the same term of court. On a suit for a special assessment in 1871 two appeals were taken, and two transcripts, identical in every syllable, were taken to the supreme court. The point made in both was that the case was identical in principle with that of Foss v. Chicago. In the Pacific Hotel case it was held to be indentical; in Monroe's case it was held that the point had no merit. On the liability of an endorser of a promissory note whose name was written before the note was issued in the first instance, it was held in the 3d. 13th, 14th, 17th, 18th and 41st Illinois Reports that he was held liable to the holder as a guarantor of payment, and not as joint maker; in two cases in the 43d and 35th the doctrine was qualified, and in the 51st Illinois all was reversed and he was held liable as joint maker. At the September term, 1875, on a short record, a motion was made to dismiss an appeal from judgment for taxes with 5 per cent. damages. The motion for damage was challenged and taken under advisement by the court; on a subsequent day the opinion was delivered by Judge McAllister in open court, in the presence of all the judges, and with their concurrence, to the effect that damages could not be given in such a case, it being a suit *in rem*. At the same term two cases of the same character were presented by the same attorneys on both sides on printed arguments, the same identical questions being presented in each case, with the same authorities. It was that, the assessment rolls being returned long after the time fixed by law, and after the date fixed when the owner of property should appear before the county board and have his assessment corrected if wrong, as the Adsit case held he must do, the rolls were incomplete and would not bind him. Chief Justice Scott wrote the opinion in one case, considering the question as meritorious, and based on a series of decisions from Marsh v. Chestnut, in the 14th Illinois to the 77th volume. Mr. Justice Walker wrote the opinion in the other case, holding the point devoid of merit, and decreeing 5 per cent. damages."

"Are these the only instances of such a character?" "It is said that more than 40 instances of this character can be adduced among the recent decisions, embracing railroad, insurance, corporation, mercantile and constitutional law, and in fact every important branch of the law, and throwing them into inextricable confusion; that the Illinois decisions are so confused and contradictory that they are not entitled to respect. A letter in the *Tribune* of March 22, dated at Belleville, quotes from the CENTRAL LAW JOURNAL and Albany *Law Journal* to support his statement, which I have in my pocket: 'I am firmly convinced that this court has done more within the last few years to destroy all confidence not only in its own decisions, but, what is a far more mischievious and far-reaching misfortune, all confidence in the stability of law as a rule of action, than any other court of last resort in this country.' I think more than 100 contradictory decisions have been rendered within ten years."

"Are there any other instances of carelessness of the court occasioned by this pressure on them?" "Another class of instances appears in such cases as Hosmer v. The People, of Sept. 7, 1875, in which a long opinion was filed, at the close of which it is said that the transcript was not authenticated by any signature or seal or certificate showing it to be a judicial record, and the court could not make a decision on it. Yet against its own decision in the same case it files 12 pages of *obiter dictum*. In the case of Brislin, involving the South Park assessments and the entire organization of the county that pays one-fourth of the taxes of the state, an opinion of 21 pages was filed in January, and in June the judges, in conference at Mt. Vernon, felt compelled to stay the proceedings, with the papers before them, on the allegation that the judges could not have seen either the record, the abstract, or the arguments of council in the case. Two years ago Judge Thornton resigned. He had said that he wrote with more facility than his associates, yet he had not time to read over his opinions, and punctuate them, or correct grammatical

mistakes. Judge McAllister resigned after having almost destroyed his health, though he had fallen a year behind in opinions on the cases allotted to him. At this term there are 78 petitions for rehearing."

"Is it true that the opinions are long and undigested?" "I read 100 pages of those written in January that could be better written in 10."

"Why were they not written more concisely?" "It is far easier to write loose statements without authority, than close, carefully-digested opinions, of which each word is fully considered and supported by the authorities."

"There is something about this court that requires remedy?" "The whole legal system of the state demands it. The court had better only decide 20 cases a year and decide them wisely, than to decide 1,000 and decide 200 of them wrong, or even equivocally. No story of the lack of intelligence in jury trials exceeds the severity of the statement that at one term of court the same question of law was presented twice to seven judges, and in one case one judge wrote an opinion deciding for the question, and giving the reasons for such decision, and all the others concurred in the reasons and judgment, and in the other case one of the judges who had concurred wrote an opposite opinion, deciding against the question and giving the reasons, and all the judges, including the writer of the first opinion, concurred in it."

"Can the judges open the reform and save their reputations?" "Yes; by stopping and doing nothing that they can not do well. If every judge will carefully study and know the law of each case, inconsistencies could not easily escape the whole seven. An error may escape one man, but it would hardly pass seven who had studied the point carefully and gave it full attention. If they would write clear, sententious statements of the law in their conclusions, supported by the authorities, as if they spoke by authority as judges, and not as if arguing and illustrating at the bar to lead the minds of others to a conclusion, they would make valuable opinions, and soon give tone to the jurisprudence of the state, and would greatly reduce the amount of litigation."

"Would they be able to decide all the cases?" "Hundreds of cases would fall behind, but the remedy has been found in New York, and can be applied here. The future is easily provided for by a statute creating the intermediate appellate courts authorized by the constitution, and empowering them to determine finally all questions of fact, and all cases coming from justices of the peace, except when they present new questions of law certified by the judges to be undecided by the supreme court."

"What cases should go to the supreme court?" "Only those involving the validity of statutes, the construction of statutes, cases involving a franchise or freehold, cases in which over $500 is involved, and cases of new questions of law propounded by the lower courts. Such limitations have been found to work in the United States Supreme Court, and to have kept its duties within limits where its decisions can be creditable. In cases of new questions, the judges of the United States Circuit Court often certify a decision on the question and present the single question of law to the supreme court. That could easily be done under a proper statute in this state as to small cases."

"What remedy is there for judicial legislation of which the *Law Journal* complains?" "When one or more judges attempt to usurp the business of legislation, and decide what is best for the state as a matter of policy in any particular, impeachment and removal from office and indictment for perjury ought to follow. These are the only remedies, though the crime is of the most disastrous character to the state, as the *Law Journal* intimates."

Foreign Selections.

RESPONDEAT SUPERIOR.—There seems to be a turn in the tide of authorities upon the somewhat artificial but well-established exception to the doctrine *respondeat superior*, in the case of a contractor employed to do a lawful work, but who is guilty of negligence causing injury during the performance of such work. The principle upon which this exception has been based is, that an independent contractor, not being the servant of the employer, is not subject to his control in the fulfillment of the duty he has engaged to perform, and therefore his employer ought not to be held responsible for the lawful and proper performance of such duty. It is obvious, of course, that, if the employer retains or exercises any control over the work while in progress, the principle will not apply, and so it was speedily held. It has also been decided that if the act contracted for is unlawful the employer can not escape from liability by the employment of a contractor; that where the employer has a statutory duty to perform he can not get rid of his obligation to fulfill it by entrusting the performance to a contractor, and that where the law casts upon the employer a duty to the public at large—such, for example, as the duty of not exposing them to danger from a nuisance incident to the execution of the work—he will be liable for such nuisance arising during the execution of the work by the contractor.

It remained to be decided whether the same principle applied to the neglect of a merely private duty. In Butler v. Hunter, 10 W. R. 214, an action was brought for damage done to the house of the plaintiff, through the negligence of the contractor employed by the defendant to pull down the adjoining house, in removing a beam from a party-wall and not shoring up the plaintiff's house, which, as a reasonable precaution, ought to have been done. Both houses were ancient houses, and a count in the declaration alleged a right of support. The Court of Exchequer held that there was no evidence of the defendant's liability. "No doubt," said Pollock, C. B., "where a thing is in itself a nuisance, and must be prejudicial, the party who employs another to do it is responsible for all the consequences that may have arisen; but when the mischief arises, not from the thing itself, but from the mode in which it is done, then the person ordering it is not responsible unless the relation of master and servant can be established." And Wilde, B., added: "It seems that the absence of a proper shoring is like the absence of a proper hoarding, or one of the ordinary precautions that belongs to the proper taking down a wall in a tradesman-like way. Then it is said that the defendant ought to have given orders to do it in a tradesman-like way, or ought to have pointed out what was requisite. That would seem to be extremely unreasonable, because it would proceed upon the supposition that an unskilled person should point out to a skilled person the proper way to do the work. I think, as a matter of course, if a man gives an order to a tradesman to do a thing, he means him to do it in a reasonable, ordinary, tradesman-like way." The rule for a new trial on the ground that there was evidence of the defendant's liability was discharged. We may add to the observations of Wilde, B., above quoted, those made more recently in the House of Lords by Lord Westbury, who, in giving judgment in Daniel v. Directors of the Metropolitan Railway, 20 W. R. 41; L. R., 5 E. & I. 61, where a contractor's servants let fall a girder they were raising over the defendants' railway upon the plaintiff, said: "The ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work. Undoubtedly, it would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation to do that which in many cases would be impossible—namely, to interpose from time to time in order to ascertain that that was done correctly and properly the business of doing which he had rightfully and properly committed to other persons."

It seems difficult to reconcile with these expressions of opinion the decision of the Queen's Bench Division in the case of Bower v. Peate, L. R. 1 Q. B. D. 321. The plaintiff and defendant were the respective owners of two adjoining houses, the plaintiff being entitled to the support for his house of the defendant's adjacent soil. The defendant employed a contractor to pull down his house, excavate the foundation, and re-build it, and in the specification according to which the contractor undertook to do the work there was the following clause: "The adjoining buildings must be well and sufficiently propped and upheld during the progress of the works by the contractor, who shall be required to take the responsibility, and to make good any damage occuring thereto." The plaintiff's house was damaged during the works, owing to the means taken by the contractor to support it being insufficient. The court held the defendant was liable, even if the undertaking as to risk, etc., had amounted (they said it did not amount) to an express stipulation that the contractor should do, as part of the works contracted for, all that was necessary to support the plaintiff's house. Instead of treating the clause in the specification as showing that the defendant had cautiously provided against mischief to his neighbor, the Queen's Bench Division seem to have regarded it almost as evidence of negligence, saying that the effect of it was, not that the defendant ordered or stipulated for any specific work necessary for the support of the adjoining buildings, but that he left the recourse to such work entirely at the discretion of the contractor, stipulating only that the latter should bear him harmless in the event of any damage taking place (p. 326). With much deference, we doubt whether the clause will fairly bear this construction.

But coming to the broader ground upon which the judgment was based, we find that ground stated as being "that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and can not relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful." The concluding words of this extract point to the rule that the right of support in respect of adjacent land is not absolute, but of a qualified kind only, and is not infringed until damage has actually happened from the act which thereupon becomes an infringement. In the recent case, therefore, the defendant selected and employed a competent contractor to do a lawful act in a lawful manner. The removal of the soil was not *per se* any violation of duty; it would only become so if any damage resulted to the adjacent house or land. What, then, was the violation of duty by the defendant? Wherein did his negligence consist? The decision in Bower v. Peate does not rest upon the ground that the negligence of the contractor was the negligence of the employer, nor wholly on the infringement of the *quasi* right of support. If put upon the former ground, it would practically have abolished the exception of the case of a contractor from the doctrine *respondeat superior*, if on the latter, the judgment might have been expressed in a few words thus: The landowner who, excavating his land by himself or an agent, interferes with a neighbor's right of support for the land adjacent, does so at his peril, and if damage results, is responsible. But this, although in effect the scope of the judgment, could not be expressed without reaffirming the principle of Bush v. Stienman, 1 B. & P. 404, as to the absolute liability of the owner of fixed property for injurious acts done thereon, and "the decision in Bush v. Stienman is

almost, if it be not entirely, overruled." *Per* Parke, B., Gayford v. Nichols, 23 L. J. Ex. 207. Neither of the foregoing cases is referred to in the judgment in Bower v. Peate, but two authorities are cited as in point, viz.: Pickard v. Smith, 10 C. B. (N. S.) 470, where something like a public nuisance had been created by a contractor leaving unguarded a coal trap on a railway platform, and Grey v. Pullen, 5 B. & S. 970, where there was a statutory duty, and upon that ground the Exchequer Chamber, in a judgment the reasoning of which has since been said in the House of Lords to be "not at all satisfactory," overruled the decision of the Queen's Bench given in favor of the defendant who had employed a contractor to dig a trench across the highway, and from the negligence of the latter in filling it up the plaintiff's wife had been hurt.

The decision in Bower v. Peate certainly seems to create another distinction in this somewhat difficult branch of the law of torts by laying down a difference between the case of a man employing a contractor to do work "from which if properly done no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted" (p. 326). We should have thought that the excavation of a cellar was work from which, if properly done, no danger could arise, and moreover, that the builder who did it would know how to do it better than the gentleman whose wine it was destined to contain. But if the decision in Bower v. Peate is correct, it would seem that the latter must personally learn—first, what is "the natural course of things;" secondly, what are the appropriate "injurious consequences" to be expected: and, thirdly, what are the means "by which such consequences may be prevented." And he must then "see to the doing of that which is necessary to prevent the mischief"—we presume by watching the contractor of the cellar from hour to hour.—*Solicitor's Journal.*

Notes of Recent Decisions.

Sureties on Bond of Officer—Effect of His Re-election.—*Hart v. Guardians, etc. of Pittsburg.* Supreme Court of Penn. 33 Leg. Int. 329. The re-election of a treasurer does not discharge his old sureties.

Right of Co-surety to Sue.—*Wright v. Grover.* Supreme Court of Penn. 33 Legal Int. 312. Opinion by Murcer, J. A co-surety who has paid an indebtedness may, without the assent of the payee, put the notes in judgment and proceed against his co-surety for his proportion.

Marine Insurance—Risk Taken by Agent.—*Horton et al. v. Merchants Mut. Ins. Co.* Supreme Court of Louisiana. 5 Ins. Law Journal, 658. Opinion by Ludeling, C. J. A company is liable for a risk taken by one of its employees, before business hours, on a vessel past due.

Testimony Taken in Former Suit.—*Patterson et al. v. Patterson.* Supreme Court of Penn. 38 Leg. Int. 312. Opinion by Mercur, J. Notes of testimony were taken upon the trial of a cause; that being discontinued, a new suit was brought between the same parties, and for the same subject-matter. *Held*, that on the death of defendant, and the substitution of his executors as parties defendants, the notes of plaintiff's testimony should be admitted in the second suit.

Statute of Limitations.—*Senseman et al. v. Hershman et al.* Supreme Court of Penn. 33 Leg. Int. 312. To take a case out of the statute of limitations there must be an acknowledgment of the debt as an existing obligation consistent with a new promise to pay it, or an express promise to do so. To be consistent with a promise to pay the debt, the acknowledgment must be such as indicates an intention to pay the debt existing at the time of the acknowledgment. The time of payment need not be immediate, but the intent to pay must be present.

Promissory Note—Material Alteration—Burden of Proof—Limitation.—*Holland v. Locke et al.* Supreme Court of Tennessee. 8 Chicago Leg. News, 397. Opinion by McFarland, J. 1. Striking out all the names except one of several payees, to a bill single, is a material alteration. 2. It rests upon the holder of the paper to show that the alteration was not made by him, before he can recover on the note. 3. The note being out of the way, the claim is barred by the statute of limitations.

"Lowest Responsible Bidder" Defined—Injunction.—*Gutta Percha Co. v. Stokely.* Com. Pleas, Phil. 33 Legal Int. 253. An act provided that contracts of the city of Philadelphia should be awarded to the "lowest responsible bidder." Plaintiffs were the lowest bidders and accompanied their bid by proof of their pecuniary responsibility. Their bid was rejected, whereupon they filed their bill for an injunction to restrain the letting of the contract to higher bidders. The answer did not deny the pecuniary responsibility of plaintiffs. *Held*, that the injunction should go.

Contract—Liability for Loss of Goods.—*Susquehanna Boom Co. v. Rogers.* Supreme Court of Penn. 33 Legal Int. 306. The owner of saw-logs made a contract with the saw-mill owner to run a stated number of logs to the boom, to be delivered to the saw-mill owners, and received an advance from them. The boom company refused to deliver to the saw-mill owner, and some of the logs were lost in a freshet. *Held*, that the title of the owner of the logs was not divested by the contract, and that the boom company were liable for negligence in a suit brought by him.

Measure of Damage—Profits—Breach of Contract.—*Hauk' v. Wise.* Supreme Court of Penn. 2 Weekly Notes, 689. 1. The damages for breach of contract, in failing to deliver lumber contracted for, can not be based upon profits which might have been made, involving a change in the character of the property, additional labor, expense, business ability, and the contingencies of business. 2. W. contracted to deliver to H. a certain quantity of logs, but failed to do so. *Held*, that the measure of damage was not the profits which H. expected to make by cutting the logs and shipping them to a point twenty miles distant.

Statute Requiring Insurance Company to Waive Right to Remove Suits to Federal Courts.—*Railway Passengers Ins. Co. v. Pierce.* Supreme Court of Ohio. 5 Ins. Law Journal, 696. Opinion by Scott, C. J. The Supreme Court of the United States have decided (20 Wallace, 445) that a statute of a state which requires a foreign insurance company, before transacting business in the state, to waive its right to remove suits, in which it is a party, from the courts of the state to the federal courts is repugnant to the constitution and laws of the United States, and therefore void; that the decision will be followed, though not approved by this court.

Written Contract Made by One Unable to Read.—*Penn. R. R. Co. v. Shay*, 33 Leg. Int. 328. Supreme Court of Pennsylvania. Opinion by Sharswood, J. 1. Plaintiff sued the railroad company for killing his son. The company produced a release from plaintiff, but plaintiff stated that he could not read, and did not know that the paper he signed was a release. *Held*, that this was not sufficient evidence of fraud, and that plaintiff should have been non-suited. 2. If a party, who can read, will not read a deed put before him for execution, or if being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which is not the subject of protection, either in equity or at law.

Statute of Frauds—Personal Property.—*Corwin v. Moorehead.* Supreme Court of Iowa. 10 West. Jurist, 524. Opinion by Rothrock, J. 1. Where the plaintiff, with the actual or implied consent of the defendant, built a school house on the defendant's land, under a contract for the same, *Held*, that such contract is not within the statute of frauds under section 4008 of the revision, and is a valid contract. 2. Where the plaintiff was to have the use of the necessary land so long as the district township "let the school house remain on the land," this right of removal fixes the right between these parties. Also, if the building was erected by the builder with his own money and for his own exclusive use as disconnected from the use of the land, and with an agreement to that effect between the owner of the land and the builder, it will, as between the parties, be considered as personal property.

Powers of the Board of Equalization to Assess Capital Stock of Corporations—Rules for So Doing.—*Pacific Hotel Co. v. Pollack et al.* Supreme Court of Illinois. 8 Chicago Leg. News, 396. Opinion by Scholfield, J. 1. The local assessor is not required to fix any valuation upon the capital stock; the return to be made by him is merely of certain facts which may be important in enabling the state board of equalization to fix its value; that this return is not necessary to give the state board jurisdiction to assess the capital stock of a particular corporation. 2. So far as this class is concerned, the board does not act as a board of review, but as an original assessor. 3. The schedule is but one form of presumptive evidence of that which admits other forms of proof equally satisfactory, for the purpose of ascertaining the data for the application of the rule adopted by the board. 4. The court states the rule and manner of assessing the capital stock of corporations.

Insurance—Waiver of Condition by Agent.—*Church v. Lafayette Fire Ins. Co.* Court of Appeals of New York. 5 Ins. Law Journal, 581. Opinion by Miller, J. 1. The policy provided that the company should not be liable until the premium was paid. *Held*, that the agent may give credit and waive the condition. 2. The insured was accustomed to receive policies from the company without payment. There was evidence tending to show an understanding with the secretary that the insurance was renewed, and the policy had been made out by the secretary, but not delivered. At a subsequent call, the plaintiff stated to a clerk, in the absence of the secretary, that he had another policy and would pay for the two together, to which the clerk apparently assented. Payment was not tendered until after the fire, a few days later, when the secretary refused to receive it, alleging no liability, on the ground that the house was unoccupied. Payment was subsequently accepted on the other policy from its original date. *Held*, that there was sufficient evidence for a jury on the question of waiver, and a refusal to submit it was error.

Insurance—Assignment of Policy.—*Liverpool, London & Globe Ins. Co. v. Verdier et al.* Supreme Court of Michigan. 5 Ins. Law Journal, 664. Opinion by Graves, J. V. insured the stock in the Home Insurance Company; also in the Merchants' Company. He afterwards took in B. as partner, when it was agreed between them that the policies should be transferred to the firm, which was accordingly done, except in the case of the "Home," whose agent at the time they sought, but were unable to find. Afterwards insurance was effected for the firm in the L. L. & G. Company, in which it was agreed, that in case of other insurance on the property, the insured should be entitled to recover from the company only its *pro rata* share of the loss, and in case of the insured's holding any other policy subject to average, this policy should also be so subject. The adjustment, according to the evidence of V., was participated in by the "Home," and he accepted from the "Hanover," one of the insurers, the amount due also from the "Home," assigning thereupon the "Home" policy to the "Hanover." *Held*, that the insurance of the Home was treated by the firm as an insurance upon the firm stock, and L. L. & G. Company had a right to regard it as contributory under its policy clause.

Revocation of Will by Marriage—Rule of Common Law and under Statute—Effect of Marriage on Will of Feme Sole.—*In re Fuller.* Supreme Court of Illinois. 5 Chicago Leg. News, 399. Opinion by Sheldon, J. 1. Under the common law, the will of a *feme sole* is revoked by her subsequent marriage. 2. Under the statute of 1872, which gives to every female of the age of eighteen years the power to devise her property by will or testament, the same reason does not exist as at common law. 3. Under the act of 1861, all a married woman's property is made her sole and separate property; but this statute gives no power of disposing of her estate. The act of 1845 gave a married woman power to dispose of her separate estate. The reason, then, for holding the will of a *feme sole* to be revoked by marriage no longer exists, as the marriage would not destroy the ambulatory nature of the will, but still leave it subject to the wife's control. 4. The enactment which went into force July 1, 1872, that "a marriage shall be deemed a revocation of a prior will," was prospective in effect, and had reference only to marriages which should take place thereafter, and did not apply to marriages which had been had prior to the passage of the act.

Intoxicating Liquor —Vendor's Liability— Joint Action.—*Jewitt v. Wanshura.* Supreme Court of Iowa. 10 West. Jurist, 527. Opinion by Day, J. 1. Where the defendant sells ale, wine or beer to one who was already intoxicated or in the habit of becoming intoxicated, he is liable for all damages caused to him by such sale the same as for injuries sustained from drunkeness produced by any other kind of intoxicating liquors. 2. A joint action does not lie for injuries sustained; each party must be liable for the injury which he occasioned, and a settlement with one party does not bar the action against another. 3. In an action for damages for selling liquors to a husband, the court instructed the jury as follows: "The defendant denies the alleged sales, and also insists for a part of the time the plaintiff herself authorized the sale of liquors to her husband. If plaintiff did direct the defendant to sell her husband what he wanted, and the defendant in good faith supposed that such request was made of her own free will, there is no liability for any sales made under these circumstances. But if you find from the evidence that the defendant knew her husband was an habitual drunkard, and knew the wife only requested the sales to be made under the restraint of her husband to keep peace with him, then the defendant is not excused if he did sell to the husband and make him drunk." *Held* correct.

Notes of Recent English Decisions.

Will—Construction—Devise of Real Estate—Leaseholds.—*Moore v. White.* High Court, Chy. Div. 24 W. R. 1038. A. devised all his real estate situate at E. and W. upon certain trusts. A. was possessed of real estate and leaseholds at E., and of leaseholds only at W. *Held*, that the leaseholds at E. and W. passed by the devise of real estate at those places.

Nuisance—Injunction—Standing Over to Answer Affidavits.—*De Bernus v. James.* High Court, Chy. Div. 20 Sol. Journal, 873. In an action to restrain the defendant from burning brick in a residential park, the defendant asked for an adjournment, to enable him to answer evidence, without being put upon terms. *Held*, that he must give an undertaking not to light a fresh kiln, as a condition of the motion standing over.

Pleading—Justification of Arrest Under Warrant "Duly" Issued.—*Scott v. McVicars.* Court of Exchequer of Ireland. 10 Ir. L. T. R. 136. Where, to an action for false arrest, the defendant pleaded that the arrest was under a warrant "duly issued" by him, as a justice of the peace, with respect to a matter within his jurisdiction, the defence was set aside, as the facts relied on as giving jurisdiction were not averred. Donohoe v. Keogh, 17 Ir. C. L. R. 39, followed.

Will—Compensation after Election—Devise of Beneficiary's Property after her Death.—*Rogers v. Williams.* High Court, Chy. Div., 24 W. R. 1039. Under the will of A, B took certain benefits. By the same will A purported to devise to C, at the death of B, certain cottages belonging to B. B sold her property and died. *Held*, that C was entitled to compensation for the value of the cottages at the death of B, out of B's estate; but not exceeding the value of the benefits received by B under A's will.

Patent—Account by Licensee—Evidence—Construction of Specification.—*Adie v. Clark.* Court of Appeal. 24 W. R. 1007. A licensee of a patent was, in a suit instituted against him by the patentee, ordered to account for all articles made under his license. On taking the account he denied that the articles he had manufactured fell within the limits of the plaintiff's patent, and sought to adduce certain documentary evidence to show that if a construction were put upon the specification whereby it would include his articles, then the patent was bad for want of novelty. *Held*, that this evidence was inadmissible. Decision of Bacon, V. C., reversed. *Dicta* in Trotman v. Wood, 16 C. B. N. S. 479, explained.

Breach of Covenant to Repair—Tortious Act of Landlord Combined with Act of God.—*Meath v. Cuthbert.* Irish Com. Pleas. 10 Ir. L. T. R. 145. In an action for non-payment of rent of premises situated on the sea shore, and for breach of covenant to repair certain buildings erected thereon, the defendant pleaded on equitable grounds, that at the time of the letting the premises were useless, and could not be rendered of any value unless a rampart were erected on the foreshore of which the plaintiff was owner, to keep out the sea, and unless the foreshore were suffered to remain undisturbed, so as to protect such rampart; that the defendant, accordingly, erected such a rampart, but that the plaintiff removed sand from the foreshore and thereby undermined the rampart erected by the defendant, which, together with the premises in respect of which the rent was payable, were consequently swept away by the violence and encroachment of the sea on the happening of a great tempest. *Held*, that the defences were bad on demurrer.

Libel—Publication Calculated to Injure Property—Injunction—Jurisdiction.—*Hammersmith Skating Rink Co. v. Dublin Skating Rink Co.* Chancery Court of Ireland. 10 Ir. L. T. R. 134. Although a publication is calculated to injure property, the court has no jurisdiction to restrain it by injunction merely on that ground, whether such publication be libellous or not. Where the defendants, in the *bona fide* belief that skates about to be introduced by the plaintiffs were an infringement of the defendants' rights under a patent, published warnings to the public, intimating that proceedings would be instituted to prevent such infringement, the court refused to grant an injunction to restrain the defendants from continuing to publish such statements, and further refused to compel the defendants to proceed to assert their alleged legal rights. *Semble*, that the court, in such case, would have no jurisdiction to compel a party to assert his legal rights. Rollins v. Hinks, L. R. 13 Eq. 355, and Axmann v. Lund, L. R. 18 Eq. 330, are overruled, though not in terms, by the Prudential Assurance Co. v. Knott, L. R. 10 Ch. 142. Dixon v. Holden, L. R. 7 Eq. 488, discussed.

Marine Insurance—Freight—Pre-payment—Loss of Part of Cargo—Pre-payment, Gross or Apportionable.—*Allison v. Bristol Marine Ins. Co.* House of Lords, 24 W. R. 1059. Under the charter-party relating to a vessel bound from Greenock to Bombay, "freight" was to be paid "on unloading and right delivery of the cargo at the rate of 42s. per ton on the quantity delivered." "Such freight" was also "to be paid, say one-half in cash on signing bills of lading, less" certain deductions, including five per cent. for insurance, "and the remainder on right delivery of the cargo." The charterer paid half the estimated amount of the freight in London. Half the cargo only was delivered in Bombay, the ship being lost. No further demand was made on the charterer, but the shipowner claimed, as for a total loss of the other half freight, against the defendant company on two policies of insurance, one for £500 on "freight valued at £2,000," the other for £700 on "freight payable abroad valued at £2,000." *Held*, that the advance by the charterer was an advance of freight, and not recoverable by him; that the payment was on account of the gross freight to be earned, and was not distributable over the whole cargo; that the other moiety of the freight was the subject-matter of insurance by the shipowner, and that as to that moiety there was a total loss. *Dictum* of Lord Kingsdown in Kirschner v. Venus, 9 W. R. 445, 12 Moo. P. C. 361, explained.

Will—Gift of Residue "Including Fund Set Apart to Answer Annuity"—Abatement.—*Re Toobal's Estate.* High Court, Chy. Div. 24 W. R. 1031. A testatrix bequeathed annuities and legacies, and directed her trustees to set apart and invest in their names sufficient funds to answer the annuities. She also directed her trustees to set apart and invest £1,000 for the purpose of paying out of the income thereof any deficiency which might arise from any decrease in the income of the fund set apart to answer the annuities. And she gave the residue of her estate, "including the fund set apart to answer the annuities, when, and so soon as such annuities shall respectively cease," to J. B. T. The estate was insufficient to pay the legacies and annuities in full, and in pursuance of an order of the court, the annuities were valued as at the death of the testatrix, and an apportionment was then made between them and the legacies; as directed by the same order the apportioned legacies were paid to the legatees, and the apportioned values of the annuities were invested, and the income paid to the respective annuitants for life. On the death of one of the annuitants, J. B. T. claimed the apportioned fund, the income of which had been paid to the annuitant, as a pecuniary legacy, under the terms of the residuary gift as quoted alone. *Held*, reversing the decision of Bacon, V. C., that nothing more than the residue had been given by the will to J. B. T., and, therefore, that he was not entitled to receive anything until the annuitants and legatees had been paid in full.

Check—Consideration—Purchase of Foreign Bills—Subsequent Dishonor—Lien of Bankers—Antecedent Debt.—*Misa v. Currie et al.* House of Lords, 24 W. R. 1049. The defendant, on the 11th of February, purchased of L. in London certain bills on Cadiz at fifteen day's date, which, by the custom of the trade, were to be paid for on the next post day, which was the 14th of February. L. was largely indebted to the plaintiffs, who were his bankers, and in consequence of pressure on their part he, on the 13th, handed to them (with other securities) a document, impressed with a penny stamp, dated the 14th of February, requesting the defendant to pay to the plaintiffs the price of the bills which he had purchased. On the 14th the defendant's agent handed the plaintiffs a check for this amount, and received the other document in exchange, but the same afternoon, hearing that L. had stopped payment, he directed the defendant's bankers not to pay the check. The bills were remitted to Cadiz, and were refused acceptance. In an action upon the check, *held*, first, that the bills upon Cadiz were a good consideration for the check, and their subsequent dishonor was no defence to the action; and, secondly, that the pre-existing debt from L. to the plaintiffs made them holders for value of the order drawn by him on the defendant, and not merely agents for collection. *Semble*, that even if the plaintiffs were merely agents to collect the money from the defendant, their lien on the balance due from their customer gave them a property in the check. Judgment of the Court of Exchequer Chamber, 23 W. R. 450, L. R. 10 Ex. 153, affirmed.

Bequest—Tenant for Life and Remainderman—Trust for Renewal, whether Absolute or Discretionary—Impossibility of Renewal—Duty to Convert—Title to Renewal Fund.—*Wraddy v. Hale.* Court of Appeal. 24 W. R. 1005. A testator entitled to an equitable share of leaseholds, held for a term of twenty-one years from 1838, the entirety of which was vested in trustees upon trust for renewal, and for raising out of the rents and profits or by mortgage, the necessary fines for renewal, bequeathed his said share to his executors upon trust to renew the lease from time to time out of the profits, and divide the surplus annually during the life of his wife equally between her and certain other persons, and after the decease of his wife he directed that the property should fall into his residuary estate; and he empowered the executors to sell at any time after his decease. He died in 1853. The executors provided their share of the fine for a renewal for the term of twenty-one years in 1859, and again for a renewal for a like term in 1866, after which year they continued to accumulate part of the profits as before to provide for a third renewal. The ecclesiastical commissioners, in whom the reversion had become vested, refused a further renewal. In a suit to administer the testator's estate, a petition was presented by one of the residuary legatees that the leaseholds might be sold, and the proceeds, together with the accumulated fund, treated as capital. *Held*, reversing the decision of Malins, V. C., that the paramount intention of the testator was to preserve the property for the benefit of the remainderman; that consequently, when they ascertained that no further renewal would be granted, it was their duty to sell the property and pay the income only of the proceeds to the tenants for life; and that, as this had not been done, an immediate sale must be ordered, with a direction to invest the proceeds and the accumulated fund in accordance with the prayer of the petition. *In re* Wood's Estate, 19 W. R. 59, L. R. 11 Eq. 572, distinguished.

Legal News and Notes.

—Erratum.—Our attention has been called to a mistake in our report of the case of the Western Union Telegraph Company v. The Western and Atlantic Railroad Company, reported *ante* p. 588. The error consists in Mr. Justice Miller being set down as dissenting from the judgment of the court, while the fact is that the opinion of the court was delivered by that learned judge himself.

—Governor Hardin has accepted the resignation of Hon. Henry M. Vories as judge of the supreme court of this state. Judge Vories tendered his resignation on account of his long-continued ill-health, which renders it unlikely that he will ever again be able to discharge the duties of his office. The vacancy will be filled by appointment for the remainder of the term, which expires Jan. 1, 1879.

—At an examination for admission to the bar of Ohio, the examiner propounded this question: "A great many years ago there lived a gentleman named Lazarus, who died possessed of chattels, real and personal. After this event, please inform us, young man, to whom did they go?" The student replied, "to his administrator and his heirs." "Well then," continued the examiner, "in four days he came to life again; inform us, sir, whose were they then?" Which interesting enquiry we submit to the lawyers. I am not a lawyer, but I see no difficulty in the enquiry. Lazarus died and was buried. As soon as he died, his property, if he left no will, vested in his heirs. The law gives no man the right to die for four days and then come to life again. Legally, Lazarus couldn't rise. I have no doubt the supreme court would decide that the Lazarus who rose was not the Lazarus who died; he was a new Lazarus. The new Lazarus would of course feel within himself that he was the old Lazarus, and go round boring his legal friends by talking about his legal wrongs, but every lawyer would leave him as quickly as possible, saying in parting, "It's a hard case, but if your heirs can prove your death, and that they came in legally under the statute, there is no way to make them disgorge. All you can do is this—you're a young fellow about sixty—hire out as clerk, try to save something from your salary so as to go into business again, build up a grand estate, and perhaps your heirs will recognize your identity.—[*Cleveland Herald.*

—Bigamy—Second Marriage Unlawfully Performed.—In Commonwealth v. Reynolds, 3 Month. West. Jurist, 362, one of the courts of quarter sessions of Pennsylvania "has decided that the fact that the officer who performed a marriage ceremony had not authority to solemnize marriages, is not a defence to an indictment for bigamy. The prisoner was convicted of bigamy, and moved for a new trial on the ground that the party who performed the second marriage had no legal authority so to do. The motion was denied. There are no grounds, said the court, for asking for a second trial. Marriage, it is true, is a civil contract, and with this idea the counsel for the rule cited in argument the law of contracts, and urged that, as in purely civil contracts, the parties must both be able to contract—must be willing to contract—and must actually make the contract; that therefore the disability of a former marriage, and having a husband living, attaching to this defendant, her second marriage was null and void, and the conviction consequently could not be sustained. That is but begging the question. For while marriage is a cival contract, it is much more. See Physicks Est., 2 Brewster's Reps., and authorities there cited: "Every other contract may be dissolved by the mutual act of the parties. No other contract can be dissolved by the legislature. It differs from other contracts in the way of making it, in the way of dissolving it, in the rights and obligations pending its existence, and in requiring more solemnity. It is a contract between one man and one woman, by which they reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife." And we may add, that so weighty and momentous to society at large is the faithful execution of this contract—so important to domestic tranquility betwixt husband and wife, as well as to the public good—that the law in all countries where advanced civilization subsists looks with a jealous eye on its solemn observance, and provides severe penalties against its infraction. Hence, in our own state, and we believe in all the states of the Union, the violation of the contract of marriage is forbidden, and punished by positive laws. Accordingly, the criminal code of Pennsylvania, of 31st March, 1860, sec. 34, punishing bigamy, says: "If any person shall have two wives, or two husbands, at one and the same time, he or she shall be guilty of a misdemeanor, and on conviction be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate and solitary confinement at labor, not exceeding two years, and the se ond marriage shall be void." Under this law this defendant was tried and found guilty. This law on its face declares the second marriage to "be void," which makes it apparent that the offence may be committed by a person under disability to contract becoming a party to a void and illegal contract of marriage. Such is the peculiar nature of this offence, and such the positive prohibition of the law against its commission, because of the great evil, if tolerated, that would be inflicted upon public society and social order.

—International Law Reform.—On the 28th ultimo, the international code committee of the Association for the Reform and Codification of the Law of Nations, met at Philadelphia, in the judges' pavilion on the exhibition grounds. David Dudley Field, of New York, presided. Letters expressing sympathy with the objects of the association were received and read from the judges of the Supreme Court of the United States, and many other distinguished jurists throughout the country. In a brief introductory address, Mr. Field reviewed the history of the association and explained its object. Its purpose, he said, was to form a code of the law of nations, that is, to establish an extended treaty to which all nations shall be parties. One such code—the postal union—now exists, having been formed within the last twenty-four months. On the same principle the association desires the establishment of a treaty defining international rights. By this means many of the causes of war may be avoided. For example, he said there is no reason why the question of extradition should not be fully defined by a treaty between all nations. The controversy now agitating Europe in regard to the Bulgarian outrages might all be settled in the same way. Mr. Childs read a paper prepared by Elihu Burritt on the "Parallel Preparation of the Public Mind for an International Code and High Court of Nations." Mr. Burritt traced the growth of public sentiment in different nations in favor of peaceful methods of settling difficulties both personal and national, reviewing the history of Peace Congresses since 1840, and closed with an eloquent tribute to his former associate and friend, Dr. James B. Miles, who died while fulfilling the duties of the office of general secretary of the Association for the Reform and Codification of the Law of Nations. Ex-Governor Washburn read a paper entitled "The Feasibility of a Code Substituting Arbitration for War, and How and by Whom this may be Accomplished." He said that the work of the conference might seem to some like an effort to move the world, but it was really simply an attempt to give direction to a movement which has existed for centuries and has now become almost automatic. In dealing with nations, he urged that the same principles obtain that govern in dealing with the individuals of whom they are made up, and the fact should not be lost sight of that the same principle which binds men together under the name of law exists in the relations of nations, with one exception, that of the absence of power. He spoke of the gradual disappearance of private war, and said that nations are now passing through precisely similar processes as those by which men's passions have been subdued and brought into subjection to law. Nations now regard and respect certain laws in regard to the mode of making war, and, the speaker argued, others can finally be made which shall abolish war altogether. The ground of his hope that this would be accomplished was the gradual change in the character of the people of Christian nations, their increased influence over their rulers, and the rapid growth of their sovereignty. He also referred to the expense of war, which is rapidly becoming a great obstacle to its frequent recurrence. The speaker argued that there are many ways in which an international code could be enforced, chief among which is a suspension of intercourse with any nation which violated it. Mr. A. P. Sprague followed with a paper on the "Causes which Promote International Law Reform, Codification and Arbitration." The last paper was by David Dudley Field on "American Contributions to International Law," and was an address of much historical interest. The following resolutions were unanimously adopted: "*Resolved*, That the duty is imposed upon this country, by its history as well as by its political and geographical position, to endeavor, by all proper means, to promote the reform and codification of the law of nations, with the view of unfolding and defining international rights and duties, and devising, if possible, a peaceful method of settling international differences. *Resolved*, That the philanthropic designs of this international work, to hasten the day when nations "shall study war no more," are made more signally important in view of the recent Turkish barbarities perpretated in the prosecution of war, barbaraties which have thrilled the civilized world with horror, and have justly incurred the condemnation of mankind. *Resolved*, That local committees in aid of this general committee should be formed in different parts of the country." The conference then adjourned.